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Explanatory note by the UNCITRAL Secretariat on the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit [1]

INTRODUCTION

1. The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit was adopted by the United Nations General Assembly and opened for signature by States on 11 December 1995. The Convention was prepared by the United Nations Commission on International Trade Law (UNCITRAL).[2]

2. UNCITRAL is an inter-governmental technical organ of the United Nations General Assembly that prepares international commercial law instruments designed to assist the international community in modernizing and harmonizing laws dealing with international trade. Other UNCITRAL legal instruments include, for example, the United Nations Convention on Contracts for the International Sale of Goods, United Nations Convention on the Limitation Period in the International Sale of Goods, United Nations Convention on the Carriage of Goods by Sea, 1978, United Nations Convention on the Liability of Operators of Transport Terminals in International

[1] This note has been prepared by the Secretariat of the United Nations Commission on International Trade Law for informational purposes; it is not an official commentary on the Convention.

[2] The draft Convention was prepared by the UNCITRAL Working Group on International Contract Practices at its thirteenth to twenty-third sessions (for the reports of those sessions, see United Nations documents A/CN.9/330, 342, 345, 358, 361, 372, 374, 388, 391, 405 and 408; reproduced in UNCITRAL Yearbooks vol. XXI: 1990 to XXVI:1995). The deliberations of the Commission on the draft Convention are reflected in paragraphs 11 to 201 of the report of the United Nations Commission on International Trade Law on the work of its twenty-eighth session (1995), Official Records of the General Assembly, Fiftieth Session, Supplement No. 17 (A/50/17), which contains in its Annex I the draft Convention as submitted by the Commission to the General Assembly. The General Assembly adopted the Convention at the Fiftieth Session by its resolution 50/48.

Trade, UNCITRAL Arbitration Rules, UNCITRAL Notes on Organizing Arbitral Proceedings, UNCITRAL Conciliation Rules, UNCITRAL Model Law on International Commercial Arbitration, United Nations Convention on International Bills of Exchange and International Promissory Notes, UNCITRAL Model Law on International Credit Transfers, UNCITRAL Model Law on Procurement of Goods, Construction and Services, and UNCITRAL Model Law on Electronic Commerce.

3. The Convention on Independent Guarantees and Stand-by Letters of Credit is designed to facilitate the use of independent guarantees and stand-by letters of credit, in particular where only one or the other of those instruments may be traditionally in use. The Convention also solidifies recognition of common basic principles and characteristics shared by the independent guarantee and the stand-by letter of credit. In order to emphasize the common umbrella of rules provided for both independent guarantees and stand-by letters of credit, and to overcome divergences that may exist in terminology, the Convention uses the neutral term "undertaking" to refer to both types of instruments.

4. Independent undertakings covered by the Convention are basic tools of international commerce. They are used in a variety of situations, for example: to secure performance of contractual obligations including construction, supply and commercial payment obligations; to secure repayment of an advance payment in the event that such repayment is required; to secure a winning bidder's obligation to enter into a procurement contract; to ensure reimbursement of payment under another undertaking; to support issuance of commercial letters of credit and insurance coverage; and to enhance creditworthiness of public and private borrowers. Yet familiarity with one or the other instrument covered by the Convention is not universal, there is a wide absence of legislative provisions dealing with them, practices concerning the two types of instruments have differed in certain respects, and important questions confronting users, practitioners and courts in the daily life of these instruments are beyond the power of the parties to settle contractually.

5. By establishing a harmonized set of rules for the two types of instruments covered, the Convention will provide greater legal certainty in their use for day-to-day commercial transactions, as well as marshall credit for public borrowers. The Convention will also facilitate issuance of independent guarantees and stand-by letters of credit in combination with each other, for example, the issuance of a stand-by letter of credit to support the issuance of a guarantee, or the reverse case, with both undertakings capable of being subject to the same legal regime. The Convention will also facilitate "syndications", which could, with the help of the Convention, more easily combine both types of instruments. That technique allows lenders to spread credit risk among the participants in the syndication, thereby enabling them to extend larger volumes of credit.

6. The Convention gives legislative support to the autonomy of the parties to apply agreed rules of practice such as the Uniform Customs and Practice for Documentary Credits (UCP), formulated by the International Chamber of Commerce (ICC) , or other rules that may evolve to deal specifically with stand-by letters of credit, and the Uniform Rules for Demand Guarantees (URDG, also formulated by ICC). In addition to being essentially consistent with the solutions found in rules of practice, the Convention supplements their operation by dealing with issues beyond the scope of such rules. It does so in particular regarding the question of fraudulent or abusive demands for payment and judicial remedies in such instances. Furthermore, the deference of the Convention to the specific terms of independent guarantees and stand-by letters of credit, including any rules of

practice incorporated therein, enables the Convention to work in tandem with rules of practice such as UCP and URDG.

7. It should be noted that, strictly speaking, an independent guarantee or stand-by letter of credit is an undertaking given to a beneficiary. Accordingly, the focus of the Convention is on the relationship between the guarantor (in the case of an independent guarantee) or the issuer (in the case of a stand-by letter of credit) (hereinafter referred to as "guarantor/issuer") and the beneficiary. The relationship between the guarantor/issuer and its customer (the principal, in the case of an independent guarantee, or the applicant, in the case of a stand-by letter of credit, hereinafter referred to as "principal/applicant") largely falls outside the scope of the Convention. The same may be said of the relationship between a guarantor/issuer and its instructing party (the instructing party being, for example, a bank, requesting, on behalf of its customer, the guarantor/issuer to issue an independent guarantee).

8. Provided below is a summary of the main features and provisions of the Convention.

I. SCOPE OF APPLICATION

A. Types of instruments covered

9. The scope of application of the Convention is confined to instruments of the type understood in practice as independent guarantees (referred to as, e.g., "demand", "first demand", "simple demand" or "bank" guarantees) or stand-by letters of credit (article 2(1)). Those instruments can be covered by the umbrella of the Convention because they share a wide area of common use. Both types of instruments, which are payable upon presentation of any stipulated documents, are used to secure against the possibility that some contingency may occur (e.g., a breach of a contract). It may be noted that another major use in particular of stand-by letters of credit is as an instrument to effectuate payment of mature indebtedness ("financial" or "direct pay" stand-by letters of credit).

10. In the undertakings covered by the Convention the guarantor/issuer promises to pay the beneficiary upon a demand for payment. The demand may, depending upon the terms of the undertaking, be either a "simple" demand or one having to be accompanied by the other documents called for in the guarantee or stand-by letter of credit. The guarantor/issuer's obligation to pay is triggered by the presentation of a demand for payment in the form, and with any supporting documents, as may be required by the independent guarantee or stand-by letter of credit. The guarantor/issuer is not called on to investigate the underlying transaction, but is merely to determine whether the documentary demand for payment conforms on its face to the terms of the guarantee or stand-by letter of credit. Because of this characteristic the instruments covered by the Convention are referred to commonly as being "independent" and "documentary" in nature.

11. Reflecting practice, various types of scenarios are envisaged in which an undertaking may be given, including at the request of the customer ("principal/applicant"), on the instruction of another entity or person ("instructing party") acting at the request of the customer of the instructing party, or on behalf of the guarantor/issuer itself (article 2(2)).

12. Full freedom is given to the parties to exclude completely the coverage of the Convention (article 1), with the result that another law becomes applicable. Since the Convention, if it is

applicable, is to a large extent suppletive rather than mandatory, wide breadth is given to exclude or alter the rules of the Convention in any given case.

B. Coverage of counter-guarantees and confirmations

13. The Convention is designed to include coverage of the "counter-guarantee". A counter-guarantee is defined in the Convention (article 6(c)) in the same essential terms as the basic notion of "undertaking", namely, as an undertaking given to the guarantor/issuer of another undertaking by its instructing party and providing for payment upon simple demand or upon demand accompanied by other documents, in conformity with the terms and any documentary conditions of the undertaking (counter-guarantee).

14. Apart from this general treatment of counter-guarantees as "undertakings", the Convention provides a specific provision on counter-guarantees in the context of fraudulent or abusive demands for payment; in that context counter-guarantees may raise questions distinct from those raised by other undertakings covered by the Convention (see below, para. 48).

15. The Convention also includes in its scope confirmations of undertakings, i.e., an undertaking added to that of, and authorized by, the guarantor/issuer. A confirmation gives the beneficiary an option of demanding payment from the confirmer as an alternative to demanding payment from the guarantor/issuer. By requiring authorization of the guarantor/issuer, the Convention does not recognize as confirmations "silent" confirmations, i.e., confirmations added without the assent of the guarantor/issuer.

C. Instruments outside scope of Convention

16. The Convention does not apply to "accessory" or "conditional" guarantees, i.e., guarantees in which the payment obligation of the guarantor involves more than the mere examination of a documentary demand for payment. Thus, the Convention does not annul or affect such other instruments in any way, nor does it regulate or discourage their use in any way. Whether it would be preferable to use in any given case an independent undertaking of the type covered by the Convention, or another type of instrument, would depend on the commercial circumstances at play, and the particular interests of the parties involved.

17. Letters of credit other than stand-by letters of credit are not covered by the Convention. However, the Convention does recognize a right of parties to international letters of credit other than stand-by letters of credit to "opt into" the Convention (article 1(2)). That provision has been included in particular because the Convention provides a set of rules that parties to commercial letters of credit may wish in their own judgment to take advantage of, in view of the broad common ground between commercial and stand-by letters of credit, and in view of the occasional difficulties in determining whether a letter of credit is of a stand-by or commercial variety.

D. Definition of "independence"

18. While it is widely recognized that undertakings of the type covered by the Convention are "independent", there has been a lack of uniformity internationally in the understanding and recognition of that essential characteristic. The Convention will promote such uniformity by

providing a definition of "independence" (article 3). That definition is phrased in terms of the undertaking not being dependent upon the existence or validity of the underlying transaction, or upon any other undertaking. The latter reference, to other undertakings, clarifies the independent nature of a counter-guarantee from the guarantee that it relates to, and of a confirmation from the stand-by letter of credit or independent guarantee that it confirms.

19. In addition, to fall within the scope of the Convention, an undertaking must not be subject to any terms or conditions not appearing in the undertaking. It is specified that, to fall within the Convention, an undertaking should not be subject to any future, uncertain act or event, with the exception of presentation of a demand and other documents by the beneficiary or of any other such act or event that falls within the "sphere of operations" of the guarantor/issuer. That is in line with the notion that the role of the guarantor/issuer in the case of independent undertakings is one of paymaster rather than investigator.

E. "Documentary" character of undertakings covered

20. As an adjunct to being "independent" from the underlying transaction, the undertakings covered by the Convention possess a "documentary" character. This means that the duties of the guarantor/issuer when faced with a demand for payment are limited to examining the demand for payment and any supporting documents to ascertain whether the demand and other documents submitted conform "facially" with what is called for under the terms of the independent guarantee or stand-by letter of credit. The effect of this rule is that undertakings possessing "non-documentary conditions" are outside the scope of the Convention. The only conditions which would not have to be documentary in nature would relate to acts or events within the sphere of operations of the guarantor/issuer. A simple example of the latter would be a determination by the guarantor/issuer as to whether a required monetary deposit had been made in a designated account maintained with that guarantor/issuer.

F. Definition of internationality

21. The Convention limits its application to undertakings that are international. Internationality is determined on the basis of the places of business, as specified in the undertaking, of any two of the following being in different States: guarantor/issuer, beneficiary, principal/applicant, instructing party, confirmer (article 4(1)). Special rules are provided for the case of an undertaking listing more than one place of business for a party, as well as for the case of a party not having a "place of business" as such, but only a habitual residence (article 4(2)).

G. Connecting factors for application of the Convention

22. The Convention applies to international undertakings in either one of two ways. The first way is linked to the location of the guarantor/issuer in a State party to the Convention ("Contracting State") (article 1(1)(a)). The second way in which the Convention applies is if the rules of private international law lead to the application of the law of a Contracting State (article 1(1)(b)).

23. The Convention provides an additional layer of harmonization of law in this field, in that its chapter VI (Conflict of laws, articles 21 and 22) supplies the rules to be followed by courts of Contracting States in identifying in any given case the law applicable to an independent guarantee

or a stand-by letter of credit. Those rules apply whether or not in a particular case it turns out that the Convention is the applicable substantive law for the independent guarantee or stand-by letter of credit in question (see below, paras. 53 and 54).

II. INTERPRETATION

24. The Convention contains a general rule that interpretation of the Convention should be with a view to its international character and the need to promote uniformity in its application (article 5). In addition, interpretation is to have regard for the observance of good faith in international practice. Abstracts of any court decisions or arbitral awards applying and interpreting a provision of the Convention will be included in the case collection system called "CLOUT" (Case law on UNCITRAL texts).

III. FORM AND CONTENT OF UNDERTAKING

25. The Convention provides rules on several aspects of the form and content of undertakings, as summarized below.

A. Issuance

26. On the question of the point of time and place of issuance (i.e., when and where the obligations of the guarantor/issuer to the beneficiary become operative), the Convention promotes certainty in an area traditionally of some uncertainty due to the existence of differing notions. The Convention rule is that issuance occurs when and where the undertaking leaves the sphere of control of the guarantor/issuer (e.g., when it is sent to the beneficiary)(article 7(1)). In addition, the Convention defines issuance in terms of its practical effect. Once issued, the undertaking is available for payment in accordance with its terms and is irrevocable.

27. As is customary in legal texts of UNCITRAL, the Convention establishes a flexible and forward looking form requirement for issuance. By requiring a form that preserves a complete record of the text of the undertaking, rather than referring to "written" form, the Convention accommodates issuance in a non-paper-based medium (e.g., by means of electronic data interchange). It does so by referring to issuance in any form that preserves a complete record of the text of the undertaking and provides a generally acceptable or specifically agreed means of authentication (article 7(2)).

28. The Convention does not deal with the question of capacity to issue undertakings (i.e., who is permitted to be a guarantor/issuer). That question, which raises regulatory or other legal implications that differ from country to country, is left to national law.

B. Amendment

29. Legislative recognition is given by the Convention to the rule of practice that amendment of an undertaking requires acceptance by the beneficiary in order to take effect, unless it is otherwise stipulated (article 8(3)). The Convention takes cognizance of the possibility that an amendment

might be authorized in advance by the beneficiary. In such cases, the amendment takes effect upon issuance (article 8(2)).

30. In one of the few provisions of the Convention that directly addresses the relationship between the principal/applicant and the guarantor/issuer, it is made clear that an amendment has no effect on the rights and obligations of the principal/applicant, or for that matter of an instructing party or of a confirmer, unless such other person consents to the amendment (article 8(4)).

C. Transfer and assignment

31. The Convention reflects the distinction drawn in practice between, on the one hand, transfer to another person of the original beneficiary's right to demand payment, and, on the other hand, assignment of the proceeds of the undertaking, if payment is made. In the case of assignment of proceeds, as contrasted with transfer, the right to demand payment remains with the original beneficiary, the assignee being given only the right to receive the proceeds of payment, if such payment occurs.

32. Regarding transfer, the Convention endorses the dual requirement, found in UCP, that the undertaking itself must state that it is transferable, and that, in addition, any actual transfer must be consented to by the guarantor/issuer (article 9). The rationale is that a change in the person who is to present the demand for payment and any accompanying documents may increase the risk assumed by the guarantor/issuer (e.g., if the guarantor/issuer would feel that the proposed transferee was less reliable or familiar than the originally designated beneficiary). For that reason guarantor/issuers are given the opportunity to consent to any given transfer.

33. Regarding assignment of proceeds, the beneficiary of the undertaking may, unless otherwise stipulated in the undertaking or elsewhere agreed, assign the proceeds (article 10(1)). If the beneficiary assigns the proceeds and if the guarantor/issuer or another person obliged to effect payment has received a notice originating from the beneficiary, payment to the assignee discharges the obligor, to the extent of its payment, from liability under the undertaking.(article 10(2)).

D. Cessation of right to demand payment

34. The Convention gives legislative effect to notions of cessation of the right to demand payment that are widely followed in practice, though not yet universally recognized in national laws or judicial precedents. Under the Convention (article 11), the events that trigger cessation include: a statement by the beneficiary releasing the guarantor/issuer; a termination of the undertaking agreed by the guarantor/issuer; full payment of the amount stipulated in the undertaking, unless the undertaking provided for automatic renewal or increase of the amount available; expiry of the validity period of the undertaking. By affirming that the presentation of the demand for payment has to occur prior to the expiry of the undertaking, the Convention will help to overcome any remaining uncertainty as to that question.

35. A degree of uncertainty still surrounds, in some jurisdictions, the question of the effect of retention of the instrument embodying the undertaking as regards definitive cessation of the right to demand payment. The Convention, in line with what is regarded widely as the best practice,

provides that in no case does retention of the instrument prolong the right to demand payment if the amount available has already been paid or if the undertaking has expired (article 11(2)). Apart from those two contexts, the parties remain free to stipulate a requirement of return of the undertaking in order to terminate the right to demand payment.

E. Expiry

36. The Convention provides (article 12) that the validity period of an undertaking expires in the following ways: at the expiry date, which may be a fixed date or the last day of a fixed period stipulated in the undertaking; if expiry is linked to the occurrence of an act or event, upon presentation of the document called for in the undertaking to indicate the occurrence of the act or event, or, if no such document is called for, by presentation by the beneficiary of certification for that purpose; or after six years from issuance, if no expiry date has been stipulated or if a stipulated expiry act or event has not occurred.

IV. RIGHTS, OBLIGATIONS AND DEFENCES

A. Determination of rights and obligations

37. The rights and obligations of the guarantor/issuer and the beneficiary are determined by the terms and conditions of the undertaking (article 13(1)). Express reference is made in the Convention to rules of practice, general conditions or usages (e.g., UCP, URDG) to which the undertaking is specifically made subject. This is in line with a main purpose of the Convention, to give legislative support to the right of commercial parties to incorporate such rules of practice, conditions or usages. That approach ensures that the Convention will remain a living instrument, sensitive to developments in practice, including future revisions of rules of practice such as UCP and URDG and the development of other international rules of practice.

38. The flexible linking of the Convention to the needs and evolving usages and standards of commercial practice is also referred to elsewhere in the Convention. For example, in the interpretation of the terms and conditions of an undertaking and in settling questions not addressed by the Convention, regard is to be had to generally accepted international rules and usages of independent guarantee or stand-by letter of credit practice (article 13(2)).

39. Similarly, the standard of conduct of the guarantor/issuer, based on good faith and the exercise of reasonable care, is to be defined by reference to generally accepted standards of international practice of independent guarantees and stand-by letters of credit (article 14(1)). While the Convention leaves open the possibility of stipulating a standard somewhat lower than the generally applicable standard of care, it clearly prohibits any exemption of the guarantor from liability for lack of good faith or gross negligence.

V. PRESENTATION OF DEMAND AND PAYMENT

A. Demand by beneficiary

40. As regards the beneficiary, the process of demanding and obtaining payment involves presenting a demand for payment and any accompanying documents in accordance with the terms of the undertaking. In view of the documentary character of the demand, the form requirements of the Convention applicable to the undertaking itself (see above, para. 27) apply to the demand (article 15(1)). The place of presentation is at the counters of the guarantor/issuer at the place of issuance, unless some other place or person is stipulated for payment purposes (article 15(2)).

41. In addition, the Convention provides (article 15(3)) that by virtue of making a demand the beneficiary implicitly certifies that the demand is not made in bad faith, and that none of the circumstances exist that would justify non-payment in accordance with the provisions of the Convention on fraudulent or abusive demands for payment (see below, paras. 47 and 48).

B. Examination of demand and payment

42. The duty of the guarantor/issuer is to examine the demand and any accompanying documents to determine whether they are in facial conformity with the terms and conditions of the undertaking, and consistent with one another (article 16(1)). That determination is to have due regard to the applicable standard of international practice, a formulation that ensures that the Convention takes account of developments in practice as regards the notion of facial conformity.

43. In a provision expressly subject to variation by the terms of the undertaking, the guarantor/issuer is given a "reasonable time", up to a maximum of seven days, to examine the demand and to decide whether to pay (article 16(2)). Thus, what is deemed a "reasonable time" may well be less than seven days, but in no case more than seven days, unless some different period is stipulated. This takes into account that the time needed for examination of the demand would depend upon the nature of each case (e.g., volume and complexity of documents to be examined).

44. If a decision is taken not to pay, the guarantor/issuer is required to promptly so notify the beneficiary, indicating the grounds therefor (article 16(2)). If the demand is determined to be conforming, payment is to be made promptly, or at any later time stipulated in the undertaking.

45. The Convention recognizes that the guarantor/issuer may, unless the undertaking provides otherwise, discharge the payment obligation by exercising a right of set-off that is generally available under the applicable law (article 18). However, the Convention does not recognize any such right of set-off with respect to claims assigned by the principal/applicant or instructing party, as such a possibility would risk undermining the purpose of the undertaking.

C. Fraudulent or abusive demands for payment

46. A main purpose of the Convention is to establish greater uniformity internationally in the manner in which guarantor/issuers and courts respond to allegations of fraud or abuse in demands

for payment under independent guarantees and stand-by letters of credit. That has been a particularly troublesome and disruptive area in practice because allegations of fraud have a tendency to arise when there is a dispute as to the performance of an underlying contractual obligation. That difficulty and the resulting uncertainty have been compounded further because of the divergent notions and ways with which such allegations have been treated both by guarantor/issuers and by courts approached for provisional measures to block payment.

47. The Convention helps to ameliorate the problem by providing an internationally agreed general definition of the types of situations in which an exception to the obligation to pay against a facially compliant demand would be justified (article 19(1)). The definition encompasses fact patterns covered in different legal systems by notions such as "fraud" or "abuse of right". The definition refers to situations in which it is manifest and clear that any document is not genuine or has been falsified, that no payment is due on the basis asserted in the demand, or that the demand has no conceivable basis.

48. For additional precision, the Convention provides illustrative examples of cases in which a demand would be deemed to have no conceivable basis (article 19(2); e.g., the underlying obligation has been undoubtedly fulfilled to the satisfaction of beneficiary; the fulfilment of the underlying obligation clearly has been prevented by wilful misconduct of beneficiary; in the case of a demand under a counter-guarantee, the beneficiary of the counter-guarantee has made payment in bad faith as guarantor/issuer of the undertaking to which the counter-guarantee relates).

49. The Convention, by entitling but not imposing a duty on the guarantor/issuer, as against the beneficiary, to refuse payment when confronted with fraud or abuse (article 19(1)), strikes a balance between different interests and considerations at play. By allowing discretion to the guarantor/issuer acting in good faith, the Convention is sensitive to the concern of guarantor/issuers over preserving the commercial reliability of undertakings as promises that are independent from underlying transactions.

50. At the same time, the Convention affirms that the principal/applicant, in the situations referred to, is entitled to provisional court measures to block payment (article 19(3)). This recognizes that it is the proper role of courts, and not of guarantors/issuers, to investigate the facts of underlying transactions. Furthermore, the Convention does not annul any rights that the principal/applicant may have in accordance with its contractual relationship with the guarantor/issuer to avoid reimbursement of payment made in contravention of the terms of that contractual relationship.

D. Provisional court measures

51. Apart from entitling a principal/applicant or an instructing party to provisional court measures blocking payment or freezing proceeds of an undertaking in the types of cases referred to above, the Convention establishes a standard of proof to be met in order to obtain such provisional measures (article 20(1)). That standard refers to ordering of provisional measures on the basis of immediately available strong evidence of a high probability that the fraudulent or abusive circumstances are present. Reference is also made to consideration of whether the principal/applicant would be likely to suffer serious harm in the absence of the provisional measures and to the possibility of the court requiring security to be posted.

52. While authorizing provisional court measures in the cases concerned, the Convention minimizes the use of judicial procedures to interfere in undertakings by limiting the granting of

provisional court measures to those types of cases, with one additional type of case. Provisional court orders blocking payment or freezing proceeds are also authorized in the case of use of an undertaking for a criminal purpose (article 20(3)).

VI. CONFLICT OF LAWS

53. As noted above (para. 23), the Convention contains in chapter VI conflict of law rules to be applied by the courts of Contracting States in order to identify the law applicable to international undertakings as defined in article 2, regardless of whether in any given case the Convention itself would prove to be the applicable law. Those conflict of laws rules recognize a choice of law stipulated in the undertaking or demonstrated by its terms or conditions, or agreed elsewhere by the guarantor/issuer and the beneficiary (article 21).

54. In the absence of a choice of law as described above, the Convention provides for application to the undertaking of the law of the State where the guarantor/issuer has that place of business at which the undertaking was issued (article 22).

VII. FINAL CLAUSES

55. The final clauses (articles 23 to 29) contain the usual provisions relating to the Secretary-General of the United Nations as depositary and providing that the Convention is subject to ratification, acceptance or approval by those States that have signed it by 11 December 1997, that it is open to accession by all States that are not signatory States and that the text is equally authentic in Arabic, Chinese, English, French, Russian and Spanish.

56. In view of its largely suppletive character, as well as of the right of parties to exclude the Convention in its entirety, no reservations are permitted. The Convention enters into force one year from the date of deposit of the fifth instrument of ratification, acceptance, approval or accession.

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REPORT OF THE WORKING GROUP ON INTERNATIONAL CONTRACT PRACTICES ON THE WORK OF ITS TWENTY-FIFTH SESSION
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I. INTRODUCTION

1. At its twenty-sixth to twenty-eighth sessions (1993 to 1995), the Commission considered three reports by the Secretariat concerning certain legal problems in the area of assignment of receivables (A/CN.9/378/Add.3, A/CN.9/397 and A/CN.9/412). In those reports it was concluded that it would be both desirable and feasible for the Commission to prepare a set of uniform rules, the purpose of which would be to remove obstacles to receivables financing arising from the uncertainty existing in various legal systems as to the validity of cross-border assignments (in which the assignor, the assignee and the debtor would not be in the same country) and as to the effects of such assignments on the debtor and other third parties. [1]

2. At its twenty-eighth session (Vienna, 2-26 May 1995), the Commission decided to entrust the Working Group on International Contract Practices with the task of preparing a uniform law on assignment in receivables financing. [2]

3. The Working Group commenced its work at its twenty-fourth session by considering a number of preliminary draft uniform rules contained in a report by the Secretary-General entitled "Discussion and preliminary draft of uniform rules" (A/CN.9/412). At that session, the Working Group was urged to strive for a legal text aimed at increasing the availability of credit (A/CN.9/420, para. 16). At the conclusion of that session, the Working Group requested the

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[1] See Official Records of the General Assembly, Forty-eighth Session, Supplement No. 17 (A/48/17), paras. 297-301; ibid., Forty-ninth Session, Supplement No. 17 (A/49/17), paras. 208-214; and ibid., Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

[2] Ibid., Fiftieth Session, Supplement No. 17 (A/50/17), paras. 374-381.

Secretariat to prepare a revised version of the draft uniform rules on assignment in receivables financing (A/CN.9/420, para. 204).

4. The Working Group, which was composed of all States members of the Commission, continued its work at its twenty-fifth session, held in New York from 8 to 19 July 1996, pursuant to a decision taken by the Commission at its twenty-ninth session (New York, 28 May-14 June 1996). [3] The session was attended by representatives of the following States members of the Working Group: Argentina, Australia, Austria, Botswana, Bulgaria, Chile, China, Egypt, Finland, France, Germany, Hungary, India, Iran (Islamic Republic of), Italy, Japan, Kenya, Mexico, Poland, Russian Federation, Singapore, Spain, Sudan, Thailand, Uganda, United Kingdom of Great Britain and Northern Ireland, United Republic of Tanzania and United States of America.

5. The session was attended by observers from the following States: Canada, Colombia, Croatia, Czech Republic, Haiti, Ireland, Israel, Lebanon, Morocco, Netherlands, Republic of Korea, Slovenia, Sweden, Switzerland, the former Yugoslav Republic of Macedonia, Turkey, Turkmenistan, Ukraine, United Arab Emirates, Venezuela and Yemen.

6. The session was attended by observers from the following international organizations: Commercial Finance Association (FCA), Factors Chain International (FCI), Federación Latinoamericana de Bancos (FELABAN), Fédération bancaire de l'Union européenne, Hague Conference on Private International Law and International Chamber of Commerce (ICC).

7. The Working Group elected the following officers:

Chairman: Mr. David Morán Bovio (Spain)

Rapporteur: Mr. Ricardo Sandoval López (Chile)

8. The Working Group had before it the provisional agenda (A/CN.9/WP.II/WP.86) and a note by the Secretariat containing revised articles of draft uniform rules on assignment in receivables financing (A/CN.9/WG.II/WP.87).

9. The Working Group adopted the following agenda:

1. Election of officers;

2. Adoption of the agenda;

3. Preparation of uniform law on assignment in receivables financing;

4. Other business;

5. Adoption of the report.

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[3] Ibid., Fifty-first Session, Supplement No. 17 (A/51/17), paras. 231-234.

II. DELIBERATIONS AND DECISIONS

10. The Working Group considered assignment in receivables financing on the basis of the note prepared by the Secretariat (A/CN.9/WG.II/WP.87).

11. At the conclusion of the session, the Working Group requested the Secretariat to revise the draft uniform rules, taking into account the deliberations and conclusions of the Working Group as set forth in section III.

III. DRAFT UNIFORM RULES ON ASSIGNMENT IN RECEIVABLES FINANCING

A. Title

12. The Working Group postponed the discussion of the title of the draft uniform rules until it had completed its review of the substantive provisions.

B. Consideration of draft articles

CHAPTER I. SCOPE OF APPLICATION AND GENERAL PROVISIONS

Article 1. Scope of application

13. The text of draft article 1 as considered by the Working Group was as follows:

"(1) [This Convention] [This Law] applies to assignments of international receivables [and to international assignments of receivables made]

"Variant A: for financing or any other commercial purposes,

"Variant B: in the context of financing contracts,

"(a) [if the assignor and the debtor have their places of business in a Contracting State] [if the assignor or the debtor has its place of business in this State]; or

"[(b) if the rules of private international law lead to the application of the law of a Contracting State].

"(2) A receivable is international if the places of business of the assignor and the debtor are in different States. [An assignment is international if the places of business of the assignor and the assignee are in different States]."

Substantive scope of application

14. The Working Group considered the question whether the scope of application of the draft uniform rules should be limited by reference to the "financing" or "commercial" purpose of the assignment. The discussion focused on the text of variants A and B in paragraph (1) of draft

article 1. It was generally felt that wording along the lines of variant A would introduce an unacceptable degree of uncertainty as to the scope of the draft uniform rules, since their application would depend on an interpretation of the assignment with a view to ascertaining its purpose.

15. As to variant B, which was intended to define the scope of the draft uniform rules in a broad yet practical way by referring to assignments made "in the context of financing contracts", the Working Group generally felt that it would also lead to unacceptable uncertainty, since it would require a determination to be made as to which transactions were within the "context" of a given financing contract. In addition, the view was expressed that a definition of "financing contract", although it might enhance certainty, would run the risk of excluding some practices that should be covered by the draft uniform rules.

16. After discussion, the Working Group decided that both variants A and B should be deleted. Concerns were expressed that the deletion of both variants resulted in excessively broadening the scope of the draft uniform rules. It was stated that adopting such a broad scope of application might adversely affect the acceptability of the draft uniform rules. It was also stated that the draft uniform rules had been intended initially to cover specific types of assignments, namely assignments made for securing credit. While the view was expressed that all assignments were made for financing purposes, it was widely felt that rules specifically intended for application in the context of financing contracts might not be appropriate for all types of assignments. Examples were given of situations, such as assignments of claims against consumers, assignments of claims derived from insurance contracts and assignments made for collection purposes, where rules might be needed that differed from the draft uniform rules.

17. Support was expressed in favour of listing in draft article 1 specific kinds of assignments, which would be excluded from the broad scope of application of the draft uniform rules. In particular, support was expressed for excluding assignment of claims against consumers. The prevailing view, however, was that it would be premature to single out any kind of transaction to be excluded from the scope of the draft uniform rules before the substantive provisions of the draft uniform rules had been considered. For example, with respect to consumers, it was stated that the provisions contained in draft article 6 might be found to provide sufficient protection. Furthermore, it was pointed out that expressly excluding consumer transactions from the scope of the draft uniform rules might raise difficult questions as to the definition of "consumer". In that connection, it was noted that the issues of consumer protection had been discussed in the context of the preparation of both the UNCITRAL Model Law on International Credit Transfers and the UNCITRAL Model Law on Electronic Commerce. Exclusion of consumer transactions from the scope of those two instruments had been suggested and eventually avoided, since it was found too difficult to provide a definition of "consumer" that would be acceptable internationally, and since it was recognized that in certain situations, both Model Laws might provide an adequate level of consumer protection.

18. After discussion, the Working Group decided that the broad scope of application resulting from the deletion of both variants A and B should be maintained, subject to possible exceptions to be identified and discussed further after review of the substantive provisions of the draft uniform rules had been completed.

Internationality

19. It was noted that the opening words of draft article 1 reflected the approach generally supported by the Working Group at its previous session that the draft uniform rules should cover both international and domestic assignments of international receivables (A/CN.9/420, para. 26). The discussion focused on the words between square brackets ("and to international assignments of receivables made"), which would result in the draft uniform rules covering international assignments of domestic receivables.

20. It was widely felt that coverage of international assignments of domestic receivables could facilitate receivables financing by providing domestic traders with easier access to international financial markets. In addition, such an approach could enhance competition among financing institutions with the beneficial result of lowering the cost of credit. It was stated that excluding domestic receivables from the scope of the draft uniform rules would unduly restrict the availability of financing through assignment of receivables that corresponded to a large portion of business activities. In addition, such an exclusion might lead to practical difficulties for financing institutions if a determination had to be made prior to the granting of credit as to the domestic or international nature of a given receivable.

21. However, various concerns were expressed with respect to broadening the scope of application of the draft uniform rules to cover international assignments of domestic receivables. One concern was that adopting a broad scope of application might lead to undesirable results for the domestic debtor, in particular if it were a consumer, whose legal position was made subject to a different legal regime merely because the domestic creditor had chosen to assign its receivables to a foreign assignee. Another concern was that broadening the scope of the draft uniform rules to cover international assignments of domestic receivables might raise questions as to possible conflicts between the domestic law applicable to a domestic receivable and the draft uniform rules that would become applicable as a result of the international assignment of that domestic receivable.

22. It was suggested that a provision along the lines of article 1(2) of the United Nations Convention on Contracts for the International Sales of Goods (hereinafter referred to as "the United Nations Sales Convention") should be included to the effect that the application of the draft uniform rules would depend upon all the parties involved (i.e., assignor, assignee and debtor) being aware of the international character of the assignment. An additional suggestion was that the debtor, upon notification of the assignment, should be entitled to object to any change to the legal regime governing its relationship with the assignor. Those proposals were objected to on the grounds that introducing a rule under which the assignment should be brought to the attention or made subject to the consent of the debtor might introduce uncertainty, and invite litigation, as to whether the debtor in fact knew of or consented to the assignment. It was stated that such a rule would detract from the objective of the draft uniform rules to enhance the availability of credit.

23. With a view to alleviating the above-mentioned concerns, it was recalled that draft article 6 provided that the international assignment of a given receivable should not result in adversely affecting the legal position of the debtor. In addition, it was stated that the application of the draft uniform rules to the assignment did not conflict with the application of the domestic law that governed the relationship between the assignor and the debtor prior to the assignment, and would continue to govern that relationship irrespective of the international character of the assignment. Furthermore, it was stated that, in practical terms, the debtor might not have a particular interest in

being made aware of the assignment, since in many cases payment would be made to the assignor acting on behalf of the assignee.

24. After discussion, the Working Group decided that the scope of the draft uniform rules should be broadly drafted to cover both assignments of international receivables and international assignments of domestic receivables, thus excluding only domestic assignments of domestic receivables.

25. As a consequence of the decision made as to the scope of the draft uniform rules in the context of paragraph (1), it was agreed that paragraph (2) of draft article 1 should establish criteria for assessing the internationality of both a "receivable" and an "assignment". It was decided that the text in square brackets ("An assignment is international if the places of business of the assignor and the assignee are in different States") should be retained without the brackets. As a matter of drafting, it was pointed out that the reference to the "place of business" might need to be reconsidered so as not to suggest that assignments made by Governments and other public entities that did not normally have a "place of business" were excluded from the scope of the draft uniform rules.

Convention or model law

26. The Working Group generally felt that, for the purpose of defining the territorial scope of application of the draft uniform rules, as well as for the purpose of specific provisions such as draft articles 4 and 21 to 23, a working assumption needed to be made as to whether the draft uniform rules would be in the form of a convention or a model law.

27. In support of preparing a model law, it was observed that a model law would afford enacting States a greater degree of flexibility in adjusting the draft uniform rules to their national legislation. In support of preparing a convention, it was observed that a convention would achieve a higher degree of certainty in the law applicable to receivables financing, which could have a positive impact on the availability and the cost of credit. In addition, it was observed that a convention could better achieve the goal of establishing, along with the UNIDROIT Convention on International Factoring (hereinafter referred to as "the Factoring Convention"), a comprehensive legal regime on assignment.

28. After consideration, the Working Group decided to adopt as a working assumption that the text being prepared would take the form of a convention. It was agreed that the Working Group would have to reconsider that assumption at a future session in view of the specific content of the draft uniform rules. In the light of that decision, the Working Group decided to delete the second bracketed language in paragraph (1)(a) and to retain the remaining language without the brackets.

Territorial scope of application

29. The Working Group next considered the question of the factors that would trigger the territorial application of the draft uniform rules. It was noted that, under paragraph (1)(a), for the draft convention to apply, it was sufficient that the assignor and the debtor had their places of business in a contracting State. It was generally felt that, in order to assess the merits of such a provision, it might be useful to set out the possible disputes which the draft convention might be called upon to resolve. The dispute situations that were identified involved the following issues: rights of the assignee against the assignor flowing from the breach of a warranty; enforcement of

the receivables by the assignee against the debtor; discharge of the debtor; defences of the debtor towards the assignee; relative rights of the assignee and the administrator in the insolvency of the assignor; relative priority rights of the assignee and a competing assignee; and effectiveness of subsequent assignments.

30. Differing views were expressed as to the question whether all or only some of the parties to the above-mentioned dispute situations should have their places of business in a contracting State. One view was that in most cases certainty and predictability would be best served if the only condition for the territorial application of the draft convention was that the assignor had its place of business in a contracting State. Another view was that the debtor too should have its place of business in a contracting State, so as to accommodate situations where a dispute arose in the context of the relationship between the debtor and the assignee. In such a case, enforcement of the assigned receivable would normally be sought in the State where the debtor had its place of business. Yet another view was that, in addition to the assignor and the debtor, and in order to address all possible disputes that might arise in the context of assignment, the assignee too should have its place of business in a contracting State, or even other parties, such as creditors of the assignor (including the administrator in the insolvency of the assignor), competing assignees and subsequent assignees. Yet another view was that which parties needed to have their places of business in a contracting State for the purpose of the application of the draft convention could depend on the nature of the issues addressed.

31. It was observed that requiring all the parties to the various disputes that might arise in the context of assignment to have their places of business in a contracting State would result in a more comprehensive coverage of those disputes by the draft convention. At the same time, however, it was pointed out that adopting such an approach might overly restrict the sphere of application of the draft convention. After discussion, the Working Group requested the Secretariat to revise draft article 1(1)(a) and to present variants reflecting the views expressed for consideration at a future session.

32. As to paragraph (1)(b) providing for the application of the draft convention by virtue of the rules of private international law, the Working Group decided to retain it within square brackets pending consideration of the variants to be prepared by the Secretariat on paragraph (1)(a).

Mandatory or non-mandatory character of the rules

33. Differing views were expressed as to whether the provisions of the draft convention should be mandatory or not. One view was that the parties to the assignment transaction should be able to opt out of the draft convention as a whole. In support of that view, it was stated that freedom of parties to determine the law applicable to their relationship was an important principle which should not be interfered with and the adoption of which would make the draft convention more easily acceptable. Another view was that the debtor too should be able to exclude the application of the draft convention in the context of the original contract. It was argued that debtors might have an interest in excluding the application of the draft convention, for example if a no-assignment clause contained in the original contract were to be considered invalid under the draft convention.

34. While it was agreed that, under the generally applicable principle of party autonomy, the assignor and the assignee should be able to choose the law applicable to their transaction, the view was expressed that such a choice should not affect the rights of the debtor and other third parties. In support of that view, it was stated that a general opting-out clause would result in third parties

having to examine the exact terms of the assignment, or of previous assignments in a chain of refinancing contracts, in order to determine whether the application of the draft convention had been excluded or not. If the right to opt out of the draft convention was also extended to the debtor, third parties might need to examine, in addition, the original contract between the debtor and the assignor. It was stated that such an approach would have the adverse effect of increasing the cost of credit. In response, it was stated that, in some cases, examination of the contracts and other relevant documents was a standard procedure, which was followed in any case by parties involved in financing transactions. On the other hand, it was observed that such an examination of documents was not standard practice for volume transactions.

35. A number of alternatives to a general opting-out provision were suggested. One suggestion was that the principle of freedom of contracts should be expressed in the context of article 8 in order to recognize the rights of the assignor and the debtor to determine whether certain receivables would be assignable and which rules should regulate a possible assignment. It was observed that such rights were already recognized under existing market practice, from which the draft convention should not depart.

36. Another suggestion was that consumers should at least be allowed to exclude the application of the draft convention. Objections were raised to this suggestion on a number of grounds, including that: it would not be easy to reach a generally agreeable definition of consumers; no useful purpose would be served by allowing consumers to opt out of the draft convention if consumers were acting as debtors, while the situation might be different only if consumers were acting as assignors; a general opting-out clause for consumers would result in excluding from the scope of application of the draft uniform rules a substantive practice involving the financing of domestic consumer receivables; the possibility for consumers to opt out would not increase their protection since most contracts between large corporations and consumers were in effect standard-term contracts which the consumers had little opportunity to negotiate in any case; and on many occasions, e.g., in the assignment of toll-road receipts, the consumer would have no interest in excluding the application of the draft convention. In that connection, it was pointed out that there was no reason why toll-road receipts stemming from payments made by consumers should be treated any differently from toll-road receipts coming from payments made by commercial or Government entities.

37. Yet another suggestion was that a way to uphold freedom of contract was to allow the parties to exclude the application of the draft convention, or to derogate from or vary the effect of its provisions, in so far as the draft convention related to their mutual rights and obligations but not to the rights and obligations of third parties. The concern was expressed that such an approach might create uncertainty as to the impact of an assignment on the rights of the debtor and other third parties. It was generally agreed, however, that while the draft convention was drafted against the general background of freedom of contract, derogation from those provisions in the draft convention that might affect the rights of the debtor and other third parties (e.g., articles 5-8, 13, 16 (3), 17 and 18) was not appropriate. Another reason for avoiding a general opting-out clause was said to be that a general opting-out clause might inadvertently result in excluding domestic rules of a mandatory nature. It was generally agreed that the mandatory or non-mandatory character of the rules contained in the draft convention depended on the type of relationship involved in each case. With respect to the relationship between the assignor and the assignee, the rules could be cast as non-mandatory, while the rules dealing with the relationship between the assignee and the debtor or other third parties should be of a mandatory nature in order to ensure effective protection of the debtor and other third parties.

38. After deliberation, the Working Group agreed that, while no general opting-out clause should be included in the draft convention, the question of whether the parties should be allowed to exclude the application of the draft convention, or to derogate from or vary the effect of its provisions that regulated their rights and obligations, should be considered in the context of each relevant article.

Article 2. Definitions

39. The text of draft article 2 as considered by the Working Group was as follows:

"For the purposes of this [Convention] [this Law]:

"(1) 'Assignment' means the agreement to transfer receivables from one party ('assignor') to another party ('assignee'), by way of sale, by way of security for performance of an obligation, or by any other way except delivery and/or endorsement of a negotiable instrument.

"[(2) 'Financing contract' means the contract in the context of which the assignor assigns its receivables to the assignee, while the assignee provides financing or other related services to the assignor or another person. Financing contracts include, but are not limited to, factoring, forfaiting, refinancing, in particular securitization, and project financing].

"(3) 'Receivable' means any right to receive or to claim the payment of a monetary sum in any currency [or commodity easily convertible into money].

"(a) 'Receivable' includes, but is not limited to:

(i) any right arising from a contract ('the original contract') made between the assignor and a third party ('the debtor');

(ii) future receivables; [and

(iii) partial and undivided interests in receivables].

"(b) 'Receivable' does not include: [...]

"(4) 'Future receivable' means:

"(a) a receivable which, while arising from a contract existing at the time of assignment, is not due at the time of assignment or has not yet been earned by performance; and

"(b) a receivable that might arise from a contract expected to be concluded after the conclusion of the assignment.

"[(5) 'Consumer receivable' means a receivable arising from a transaction made for personal, family or household purposes.]

"(6) 'Writing' means any form of communication which preserves a complete record of the information contained therein and provides authentication of its source by generally accepted means or by a procedure agreed upon by the sender and the addressee of the communication.

"(7) If a party has more than one place of business, the place of business is that which has the closest relationship to the relevant contract and its performance, having regard to the circumstances known to or contemplated by the parties at any time before or at the time of the conclusion of that contract. If a party does not have a place of business, reference is to be made to its habitual residence."

Paragraph (1) ("Assignment")

40. While there was general agreement as to the substance of paragraph (1), a number of observations and suggestions were made as to its exact formulation.

"'Assignment' means the agreement to transfer receivables from one party ('assignor') to another party ('assignee') ..."

41. The Working Group noted that the term "agreement" had been inserted in the definition of "assignment" in order to avoid a tautology which would otherwise result from the combined application of paragraph (1) of draft article 2 and paragraph (1)(a) of draft article 6 ("an assignment transfers"). It was generally felt, however, that use of the term "agreement" in the definition of "assignment" might lead to the draft convention being misinterpreted as covering only the agreement to assign at a future date, thus creating obligations only as of the time when the receivables were actually assigned. With a view to avoiding such a misinterpretation, it was suggested that the words "agreement to transfer" should be replaced by the words "transfer by agreement".

42. Differing views were expressed as to the kinds of assignments that should be covered by the draft convention. One view was that the scope of the draft convention should be limited to assignments made by agreement. Involuntary assignments (e.g., garnishments) and assignments by operation of law should thus be excluded from the definition of "assignment" under the draft convention. In support of that view, it was stated that such non-contractual assignments were not commonly used for financing purposes. A contrary view was that transfers of receivables by operation of law should be covered by the draft convention alongside assignments made by agreement. As an example of such assignments by operation of law that were described as particularly important, it was stated that assignments of claims arising under insurance contracts should be covered by the draft convention. Yet another view was that the definition of "assignment" should refer to "transfer by written agreement" in order to exclude oral assignments from the scope of application of the draft convention.

43. As to the exact meaning of the terms "assignor", "assignee" and "debtor", a number of suggestions were made, including that: they should be defined in more detail; categories of assignors, assignees or debtors should be included in (e.g., Governments and other public entities), or excluded from (e.g., individuals), the definition; and that the debtor should not be identified as a "third party" since that expression was used in the draft convention to indicate creditors of the assignor. In response to a query that was raised, it was stated that assignments of receivables from a parent to a subsidiary corporation or from otherwise closely connected corporations were covered by the current formulation of the definition of "assignment".

44. It was noted that paragraph (2) of draft article 2 contained a reference not only to assignments for financing but also to assignments for servicing purposes. A suggestion was made that such a reference might need to be added to paragraph (1) as well, in order to recognize and facilitate an important practice relating to assignments.

"... by way of sale, by way of security for performance of an obligation, or by any other way ..."

45. It was observed that, in its current formulation, paragraph (1) might not adequately cover all assignment-related practices (e.g., subrogation, novation, pledge). It was generally felt that the definition of "assignment" should be reviewed to make it clear that all such practices fell within the scope of the draft convention. As a matter of drafting, it was suggested that, if the draft convention was intended to cover all categories of assignment, inspiration might be drawn from the typology used in a number of jurisdictions, where all conceivable assignments were regarded as falling within one of the two following legal categories: "outright assignments" (which included assignments by sale or gift) and "security assignments".

46. As to the reference to assignment "by way of sale" in the draft definition, the view was expressed that paragraph (1) might need to be revised in order to indicate more clearly that an agreement in the form of a sale of receivables might cover in fact a private security arrangement between the assignor and the assignee.

"... except delivery and/or endorsement of a negotiable instrument"

47. It was generally agreed that assignments made by way of endorsement of a negotiable instrument needed to be excluded from the scope of the draft convention to preserve the negotiability of the instrument and to allow the transferee to benefit from the protection afforded by special rules applicable to negotiable instruments. It was generally felt that, for the same reasons, the transfer of bearer documents by delivery without endorsement should also be excluded from the definition. It was also felt, however, that there was no reason to exclude the transfer of other unendorsed negotiable instruments by delivery from the scope of the draft convention. It was pointed out that in many cases receivables existed both on the basis of a contract and in the form of a particular instrument, e.g., a promissory note, for the reason that the promissory note allowed the holder to obtain payment by way of summary proceedings in court. It was suggested that the assignment of the receivable independently of the promissory note should not be excluded from the definition.

48. In addition, it was observed that, in its current formulation, paragraph (1) failed to exclude the transfer of paperless securities, which was subject to special rules but did not require any endorsement, since it was normally done by way of entry in a registry. It was suggested that paragraph (1) might need to be redrafted to make it clear that such transfers were excluded from the definition of "assignment". In that connection, it was pointed out that, while receivables might flow from securities, securities as such would not fall under the definition of "receivable" in paragraph (3).

49. After discussion, the Working Group requested the Secretariat to redraft paragraph (1) taking into account the above-mentioned views, concerns and suggestions.

Paragraph (2) ("Financing contract")

50. Differing views were expressed as to whether paragraph (2) should be deleted. In support of deletion, it was stated that, further to the deletion of variant B in article 1(1), under which the scope of the draft convention would have covered "assignments made in the context of financing contracts", paragraph (2) was superfluous. In support of retention, it was observed that paragraph (2) was necessary to clarify a term used in the title of the draft convention, as well as in draft articles 10(4) and 12(2). In addition, it was pointed out that paragraph (2) contained a number of useful elements, including the reference to assignments for servicing purposes and the possibility that the assignor and the borrower might be two different persons.

51. A number of suggestions of a drafting nature were made, including: that the term "financing" should be replaced by the terms "money or credit"; and that the assignment for servicing purposes should be emphasized. In that connection, a concern was expressed that such a general formulation might inadvertently result in bringing within the scope of the draft convention transactions that should not be covered, such as cash-management arrangements.

52. After discussion, the Working Group decided to defer its decision on paragraph (2) until it had completed its review of draft articles 10(4) and 12(2) and the draft convention.

Paragraph (3) ("Receivable")

Chapeau

53. There was general agreement that the essence of the receivables to be covered by the draft convention was adequately captured in the words "right to receive and to claim payment of a monetary sum". Some doubt was expressed, however, as to whether that formulation sufficiently covered future cash flows, e.g., toll road receipts stemming from concession agreements, or royalties flowing from licence agreements, which should also be brought within the scope of application of the draft convention.

54. The view was expressed that the right to receive or to claim a commodity, which appeared in paragraph (3) within square brackets, could not be considered to be a "receivable" and should be deleted. It was added that commodity trading raised a number of complicated issues that the draft convention should not attempt to address. While it was agreed that the right to claim commodities could not be viewed as a "receivable", the view was expressed that lending of gold or other precious metals formed a significant practice that might be covered by the draft convention. The example was given of "loans" in gold in which the borrower was obliged either to return the gold or to buy it paying its price. While the Working Group was not opposed in principle to covering such transactions, the view was expressed that, to the extent that commodities were traded in organized markets which were subject to special rules, the draft convention should not deal with transfers of commodities.

55. After discussion, the Working Group found the substance of the chapeau of paragraph (3) to be generally acceptable. The Secretariat was requested to prepare a revised draft taking into account the views expressed and the suggestions made.

Subparagraph (a)

56. The Working Group noted that in subparagraph (a) certain types of receivables were listed that needed to be emphasized because of their importance (contractual receivables) or because of the doubt existing under certain legal systems as to their assignability (future receivables and partial and undivided interests in receivables).

57. The concern was expressed that an approach based on an enumeration of receivables to be covered by the draft convention was unnecessary, in view of the broad language used in the chapeau. Such an approach could, in addition, have the unintended result of excluding certain types of receivables that should be covered. In order to address that concern, it was suggested that the language used in the chapeau could possibly be supplemented with a view to achieving a sufficiently broad definition of "receivable".

58. In support of such a broad approach, it was observed that it would result in covering all the types of receivables that needed to be covered (e.g., future receivables, partial and undivided interests in receivables). In addition, it was stated that such an approach would enhance certainty in the application of the draft convention, since, for example, it would not be necessary to make a distinction between contractual and non-contractual receivables, which was not always easy to draw in view of the wide divergences existing among legal systems (e.g., claims for damages to goods caused by other goods, which in some legal systems might be based on contract, and in other legal systems on product liability, and claims from tortious breach of contract).

59. The Working Group found the approach based on a broad definition of receivables to be generally acceptable. For the purpose of clarification, a number of receivables that should be covered were cited, including: partial and undivided interests in receivables, which were important in the context of securitization and loan participations; government receivables, subject possibly to a special treatment of no-assignment clauses; insurance receivables, with the possible exception of receivables arising from reinsurance contracts; receivables arising from lease agreements relating to real property and equipment; receivables arising from licence and concession agreements; and receivables arising from, or confirmed by, court decisions.

60. As to the specific formulation of a broad definition of "receivable", a number of suggestions were made. One suggestion was to refer to contractual and non-contractual receivables, including liquidated damages and damages at large. Another suggestion was that subparagraph (a) should be moved to the chapeau and revised so as to read along the following lines: "any right to receive and to claim payment of a monetary sum in any currency, arising from a contract ('the original contract') made between the assignor and another party ('debtor'), a tort or any other source". In that connection, it was stated that, in order to align subparagraph (a)(i) with the wording used in the chapeau, "right arising under a contract" should be qualified by reference to a "right to receive or to claim payment".

61. After deliberation, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (a) with a view to providing a broad definition of "receivable", taking into account the observations and suggestions made.

Subparagraph (b)

62. It was generally agreed that, in view of the broad approach taken by the Working Group with regard to the definition of assignments and receivables to be covered by the draft convention, it would be necessary to list receivables that should be excluded. In that connection, the view was expressed that excluded receivables could be listed in a separate paragraph or article along with assignments and, possibly, types of assignors, assignees and debtors to be excluded from the scope of the draft convention.

63. As to the types of receivables to be excluded from the sphere of application of the draft convention, a number of receivables were mentioned, including: employee-wage receivables, since those receivables were subject to special laws and no market existed involving financing on the basis of such receivables; receivables in connection with the sale of a business, since it was a sale and not a financing transaction; contractual receivables in cases in which the assignee was to perform the contract from which the receivables arose; deposit accounts, since they were subject to special regulation; private transactions; and tort receivables.

64. Differing views were expressed as to whether receivables arising from torts should be covered. One view was that there was no significant market involving the transfer of tort receivables for financing or servicing purposes. Another view was that, although tort receivables were normally not assigned for financing purposes, there was a significant market (e.g., for the transfer of insurance claims from the injured person to the insurance company) which should be covered by the draft convention.

65. In connection with its discussion of the financing purpose of the assignment of certain types of receivables, the Working Group resumed the exchange of views held in the context of draft article 1 as to whether the applicability of the draft convention should be linked to the purpose of the assignment. One view was that any reference to "financing" as the purpose of the assignment should be avoided since assignment-related practices existed outside the context of financing and such practices should also be covered by the draft convention. Another view was that only assignments for financing purposes should be covered and that the reference to the financing purpose of assignment contained in variant A of article 1(1) might need to be reintroduced.

66. The prevailing view, however, was that, while the focus of the draft convention should be on assignments made in order to secure financing or other related services, the Working Group was not prevented from adopting a broader approach so as to cover other types of assignment, as long as it did not attempt to cover all assignments, an approach which was said to be impractical and unnecessary. Accordingly, the Working Group confirmed the decision taken in the context of its discussion of draft article 1 that assignment should be defined in broad terms, and requested the Secretariat to introduce, at an appropriate place in the draft convention, a list of assignments, receivables and parties to be excluded from the scope of the draft convention.

67. During the discussion, the question was raised as to whether the aim of the draft convention was to harmonize and replace assignment-related rules currently existing under national laws or, rather, to create a new type of assignment, while preserving existing rules of national laws. In support of the latter approach, it was stated that international financial markets could benefit from a uniform law which would add a new type to the already existing types of assignment and which could be tailor-made to meet the financing needs of the marketplace. In addition, it was pointed out that attempting to replace existing assignment practices might be unrealistic and unnecessary.

The view was expressed that, if the draft convention were to establish a new type of assignment available to parties along with national assignment-related practices, a mechanism should be devised to trigger the application of the draft convention. In that regard, reference was made to an opting-in or opting-out clause. In view of the decision of the Working Group, taken in the context of its discussion on article 1, not to incorporate a general opting-out clause but to consider the possibility of allowing parties to opt-out, derogate from or vary specific provisions of the draft convention, the suggestion was made that the possibility of an opting-in approach should also be considered.

68. In support of an approach aimed at harmonizing national assignment-related practices, it was observed that it would achieve a higher degree of certainty and predictability, which was essential to the unhindered development of receivables financing. It was stated that such an approach had already been successfully taken in a number of UNCITRAL conventions, notably the United Nations Sales Convention. Moreover, it was argued that, while the matter required careful consideration and consultations with representatives of the practices that would be covered by the draft convention, States might be willing to accept the possibility that domestic practices would be affected.

69. After discussion, the Working Group decided to proceed on the working assumption that the draft convention would harmonize and replace assignment-related practices existing under national laws. It was agreed that that assumption would need to be reconsidered at a future session in view of the specific contents of the provisions of the draft convention.

Paragraphs (4) and (5) ("Future receivable" and "Consumer receivable")

70. The Working Group deferred discussion on paragraphs (4) and (5) until it had reviewed the provisions in the context of which the terms "future receivable" and "consumer receivable" were used (see paras. 94-99 and 234-238 respectively).

Paragraph (6) ("Writing")

71. The substance of paragraph (6) was found to be generally acceptable. However, the Working Group noted that articles 6 and 7 of the UNCITRAL Model Law on Electronic Commerce adopted by the Commission at its twenty-ninth session (New York, 28 May to 14 June 1996), while not defining "writing" as such, provided for a functional electronic equivalent of "writing" and "signature". The Secretariat was requested to align the definition of "writing" with those articles of the Model Law.

Paragraph (7)

72. The Working Group found the substance of paragraph (7) to be generally acceptable. In view of the fact that paragraph (7), which was intended to apply throughout the draft convention, did not establish a definition of the notion of "place of business" but rather dealt with the issue of multiple places of business, the Working Group agreed that paragraph (7) should be placed in draft article 1.

Article 3. International obligations of the [contracting] [enacting] State

73. The text of draft article 3 as considered by the Working Group was as follows:

"Variant A

"This Convention does not prevail over any international agreement which has been or may be entered into and which contains provisions concerning the matters governed by this Convention, provided that the assignor and the debtor have their places of business in States parties to such agreement.

"Variant B

"The provisions of this Law apply subject to any agreement in force between this State and any other State or States."

74. The Working Group noted that, while variant A, which was modelled on article 90 of the United Nations Sales Convention, would fit into a convention, variant B, which was inspired by the UNCITRAL Model Law on International Commercial Arbitration, would be suitable in a model law.

75. In view of its decision to proceed on the working assumption that the uniform law being prepared would take the form of convention, the Working Group decided that only the text of variant A, the substance of which was found to be generally acceptable, should be retained.

Article 4. Principles of interpretation

76. The text of draft article 4 as considered by the Working Group was as follows:

"(1) In the interpretation of this [Convention] [this Law], regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

"[(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based [or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law]]."

77. The Working Group noted that draft article 4, which was modelled on article 7 of the United Nations Sales Convention, addressed the issue of interpretation of the draft convention, and established a provision for dealing with matters not expressly settled in the draft convention (often referred to as a gap-filling provision).

78. While the Working Group found the substance of article 4 to be generally acceptable, it considered the question whether paragraph (2) should be retained or deleted.

79. The Working Group noted that, while the United Nations Sales Convention contained a rule on interpretation and gap-filling but no conflict-of-laws rules, the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit included conflict-of-laws rules and a rule on interpretation but no provision on gap-filling.

80. The view was expressed that the discussion on whether paragraph (2) was necessary or not should be deferred until the Working Group had completed its consideration of the conflict-of-laws rules contained in the draft convention (draft articles 21-23). In opposition to that view, it was observed that paragraph (2) would be useful irrespective of whether the draft convention were to include conflict-of-laws rules or not.

81. After discussion, the Working Group decided to retain paragraph (2), without square brackets.

CHAPTER II. FORM AND CONTENT OF ASSIGNMENT

Article 5. Form of assignment

82. The text of draft article 5 as considered by the Working Group was as follows:

"Variant A

"An assignment need not be effected or evidenced by writing and is not subject to any other requirement as to form. It may be proved by any means, including witnesses.

"Variant B

"An assignment in a form other than in writing is not effective [towards third parties]."

83. Support was expressed in favour of both variant A and variant B. In favour of variant A, it was stated that an assignee's right in the assigned receivables should be independent from formalities. It was also stated that adopting no form requirement for the assignment would be consistent with the absence of specific form requirements under most national laws with respect to the original contract between the debtor and the assignor, and to the underlying financing contract between the assignor and the assignee. It was further stated that variant A was the only approach acceptable under the national laws of a number of countries where imposing specific form requirements for assignment transactions would be regarded as contrary to the general principles of contract law. As a matter of drafting, it was noted that variant A was modelled on article 11 of the United Nations Sales Convention. The view was expressed, however, that, while form requirements needed to be considered with respect to both the effectiveness and the evidence of the assignment, it might be inappropriate to deal with those two separate issues in a single provision.

84. Support was also expressed in favour of variant B, which provided that purely oral assignments would not produce effects towards any party or, alternatively, that such oral assignments would not produce effects towards third parties. In support of adopting a provision that would, in fact, result in a general prohibition of purely oral assignments, it was stated that such a prohibition, consistent with existing law in certain countries, was particularly needed in view of the decision of the Working Group to extend the scope of the draft convention to cover international assignments of domestic receivables. In order to achieve such a prohibition, it was

suggested that the words "towards third parties" should be deleted. As a matter of drafting, it was suggested that the current wording of variant B might need to be reviewed to make it clear that a purely oral assignment could be rendered effective if it was subsequently put in writing.

85. In support of limiting the effectiveness of purely oral assignments to the context of the relationship between the assignor and the assignee, it was stated that a provision along those lines would preserve party autonomy, without adversely affecting the interests of third parties, i.e., creditors of the assignor or other persons to whom the assignor might have assigned the same receivables. In that connection, a question was raised as to whether the debtor should be regarded as a "third party" under draft article 5. It was recalled that the provisions of draft article 5 did not prejudice the interests of the debtor to the extent that the debtor would be entitled, before notification, to pay the assignor and be discharged. However, it was noted that the debtor was normally a third party to the assignment transaction and that it was described as a "third party" under paragraph (3) of draft article 2. It was generally felt that the text of variant B should be clarified in that respect. As a matter of drafting, it was suggested that the words "other than the debtor" should be added after the words "towards third parties".

86. The Working Group failed to achieve consensus as to which of the two variants should be adopted. It was generally felt that the discussion should be reopened in the context of future deliberations as to the time when an assignment became effective towards third parties. After discussion, the Working Group decided that the text of the two variants should be maintained in the revised draft to be prepared by the Secretariat for consideration at a future session.

Article 6. Content of assignment

87. The text of draft article 6 as considered by the Working Group was as follows:

"(1) Subject to the provisions of [this Convention] [this Law]:

"(a) an assignment transfers to the assignee the right of the assignor to claim and to receive payment of the assigned receivables; and

"(b) an assignment does not have any effect on the debtor's duty to pay other than to pay to the assignee.

"(2) Without the debtor's consent, the assignment does not affect the obligations of the assignor arising from the original contract."

Paragraph (1)

88. It was generally felt that, as a result of the decisions made by the Working Group with respect to the definitions of "assignment" and "receivable" in draft article 2, paragraph (1) (a) had become superfluous and should be deleted.

89. The Working Group agreed that paragraph (1)(b) reflected a principle of paramount importance for the protection of the debtor, namely that the debtor's legal position should not be affected as a result of the assignment. In that connection, however, it was observed that the mere change in the identity of the creditor resulting from the assignment might cause a certain degree of

inconvenience to the debtor. Examples were given of situations where, in view of the decision made by the Working Group to extend the scope of the draft convention to cover international assignments of domestic receivables, such inconvenience might result from the assignee being a foreigner to the debtor.

90. A number of observations and suggestions were made as to how that fundamental principle should be expressed and where it should be reflected in the draft convention. One observation was that the provision should clearly establish that the change in the identity of the creditor, in itself, should not be regarded as unduly affecting the position of the debtor. Another observation was that the provision should be redrafted, since paragraph (1)(b) might give the impression that the assignment itself triggered the obligation of the debtor to pay. With a view to avoiding such a possible misinterpretation, it was suggested that the words "subject to article 13" should be placed at the opening of the provision. Yet another observation was that the title of article 6 might not fully correspond to its contents, in particular since paragraph (1)(b) did not address the content of the assignment but the debtor's duty to pay. As to the location of the provision, it was suggested that the general principle of debtor protection should be expressed as one of the first provisions of the draft convention. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (1)(b), taking into account the observations and suggestions made, and to place it at an appropriate place in the draft convention.

Paragraph (2)

91. It was noted that paragraph (2), which attempted to clarify further the content of the assignment, was not intended to invalidate other types of assignment, e.g., novation of obligations or the assignment of a contract as a whole, which were outside the scope of the draft convention.

92. While the view was expressed that the general policy reflected in paragraph (2) was acceptable, it was generally felt that paragraph (2) was unnecessary in that it dealt not with the content of the assignment but with the original contract. In addition, it was stated that paragraph (2) might be inconsistent with the decision of the Working Group to cover assignments which did not involve an original contract. After discussion, the Working Group decided that paragraph (2) should be deleted.

Article 7. Bulk assignment and assignment of single receivables

93. The text of draft article 7 as considered by the Working Group was as follows:

"(1) One or more, existing or future, receivables may be assigned.

"(2) An assignment of one or more, existing or future, receivables that are not specified individually transfers the receivables, if they can be identified as receivables to which the assignment relates, either at the time of assignment or when the receivables become due or are earned by performance.

"(3) An assignment of future receivables transfers the receivables directly to the assignee, without the need for a new assignment".

Paragraph (4) of draft article 2 ("Future receivable")

94. Prior to discussing the text of draft article 7, the Working Group considered the definition of "future receivable", which had been reserved for future deliberation in the context of draft article 2 (see para. 70).

Subparagraph (a)

95. It was suggested that, consistent with the definition of "receivable" adopted under paragraph (3) of draft article 2, the definition of "future receivable" should cover non-contractual receivables alongside receivables arising from a contract. In that connection, a suggestion was made to combine the texts of subparagraphs (a) and (b) along the following lines: "future receivable means a receivable which may arise in the future pursuant to a contract existing at the time of the assignment or otherwise."

96. The discussion, however, focused on the main situation described under subparagraph (a), i.e., the case where a receivable, "while arising from a contract existing at the time of assignment", was "not due at the time of assignment". The view was expressed that such a situation did not address a "future receivable" but a receivable already in existence at the time of assignment, although payment was not due until a later time. It was widely felt that, in fact, such a situation was the one most commonly found in practice, where payment being due at a date posterior to that of the assignment was not normally regarded as characterizing a "future receivable".

97. After discussion, the Working Group decided that, as a matter of policy, receivables arising from contracts existing at the time of the assignment should not be considered as future receivables and, therefore, subparagraph (a) should be deleted.

Subparagraph (b)

98. A number of concerns were expressed with regard to subparagraph (b). One concern was that covering a receivable that "might" arise from a contract "expected" to be concluded at a later time resulted in a definition of "future receivable" that was too broad. Another concern was that the reference to a contract "expected" to be concluded was misleading, since it suggested the need to interpret the expectations of the various parties at the time of the assignment. It was observed that such expectations were irrelevant to the definition of a "future receivable", which should simply regard as "future" any receivable that might arise after the conclusion of the assignment. In order to address those concerns, the suggestion was made that "the definition of future receivable" should be redrafted along the following lines: "Future receivable means a receivable that might arise after the conclusion of the assignment."

99. After discussion, the Working Group requested the Secretariat to prepare a revised draft of subparagraph (b) to reflect the various views and suggestions expressed.

100. Having completed its discussion of the definition of "future receivable", the Working Group reverted to draft article 7.

Paragraph (1)

101. The Working Group found the substance of paragraph (1) to be generally acceptable.

Paragraph (2)

"An assignment of one or more, existing or future, receivables that are not specified individually transfers the receivables, (...)"

102. The Working Group found the substance of the opening words of paragraph (2) to be generally acceptable.

"(...) if they can be identified as receivables to which the assignment relates, (...)"

103. The discussion focused on the question of whether and to what extent "conditional" or "hypothetical" receivables should be covered under draft article 7. It was recalled that, at the previous session of the Working Group, some doubts had been expressed as to whether the draft convention should recognize the entire range of future receivables. In addition, it was noted that bulk assignments of "conditional" receivables (i.e., receivables that might arise subject to a future event that might or might not take place) and "purely hypothetical" receivables might result in a business entity assigning all its "future" and "hypothetical" claims for the entire duration of its existence, a practice that might run counter to public policy in certain countries (see A/CN.9/420, paras. 53 and 54).

104. The view was expressed that hypothetical and conditional receivables should not be covered by the draft convention. It was observed that the validity of bulk assignments of hypothetical and conditional receivables was questioned under existing national laws in certain countries on several grounds, including that such assignments unduly restricted the economic autonomy of the assignor, or that they were unfair to creditors in the context of the insolvency of the assignor. However, a note of caution was struck about establishing a blanket exclusion of bulk assignments of hypothetical receivables. It was stated that in certain areas such as project financing, assignment of uncertain future claims was of considerable practical importance. For example, it was of great importance to recognize that a project finance borrower building and operating a toll road might validly assign all future toll receipts in order to obtain financing needed for the project. With respect to that example, doubts were expressed as to whether such situations, where claims against toll-road users would arise and payment would be made simultaneously, should be identified as assignments of future receivables or would be better described as assignments of future cash flows or payment streams. It was suggested that paragraph (2) should make it clear that the assignment of future cash flows was also covered by the draft convention.

105. After discussion, the Working Group agreed that the criterion used in paragraph (2), i.e., that the receivables should be "identified as receivables to which the assignment relates", provided appropriate recognition of the economic need to allow bulk assignments of various types of future receivables on the one hand, and the need to protect the parties against the risks that might result from unlimited freedom to assign all conceivable future receivables on the other hand.

106. A question was raised as to whether assignments of future receivables should be validated only if they were made for consideration, i.e., if assignments made as gifts should also be covered. It was widely felt that mere gifts between individuals should be excluded from the scope of the draft convention. In that connection, a view was expressed that issues such as a possible limitation in the scope of the draft convention to cover only assignments made for financing purposes, and a possible exclusion of consumer transactions from the scope of the draft convention, might need to be reconsidered at a later stage. It was also felt, however, that, should the issue of assignments

made as gifts be dealt with by way of exclusion in draft article 1 or elsewhere in the text, attention should be given to avoid inadvertently excluding certain kinds of assignments that should be covered by the draft convention, although they were not made for monetary consideration. Examples given in that respect included, assignments made in the context of transactions between subsidiaries and parent companies, or in the context of "intra-group" transactions. It was suggested that, when drafting such possible exclusions, wording such as "assignment for value" might be considered with a view to covering cases where the consideration or "counter-weight" of the assignment might not be monetary but consist, for example, of a commitment, guarantee or other undertaking.

"(...) either at the time of assignment or when the receivables become due or are earned by performance"

107. It was noted that, under paragraph (2), the only condition of validity of the transfer was that the receivables could be identified as related to the assignment, either at the time of assignment or when they came into existence. Various views were expressed as to the time when the receivables should be "identified" as relating to the assignment. One view was that the time as of which future receivables should be identified should be left to the parties' discretion, as was currently the case under paragraph (2). In that connection, it was suggested that the time when the receivable arose should be added to the time of assignment and the time when the receivable became due in paragraph (2). Another view was that a future receivable should be identified at the time of the assignment. Yet another view was that no specific receivable had to be identified at the time of the assignment, as long as the category to which such a receivable belonged was identified sufficiently, when the receivable came into existence.

108. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (2), including possible variants reflecting the various views and suggestions expressed.

Paragraph (3)

109. It was generally felt that, if paragraph (2) dealt with the time when receivables should be identified, paragraph (3) should deal with the time when the assigned receivables were transferred. Various views were expressed as to the specific point in time when the transfer of future receivables should be effected. One view was that the transfer should take place at the time when the future receivables arose. It was suggested that the words "when they arise" should be added at the end of paragraph (3). In support of that view, it was stated that, in the context of future receivables, it might be more appropriate for rights to be transferred only as of the time when they came into existence.

110. Another view was that the future receivables should be transferred as of the time of the assignment. In support of that view, it was stated that, for example, future receivables assigned prior to the beginning of a suspect period in the context of insolvency proceedings should not be treated differently whether the receivables arose before or during the suspect period.

111. A question was raised as to whether the transfer of the assigned receivables would be valid as against third parties or whether it would be effective only as between the assignor and the assignee. It was widely felt that the transfer should be effective at the same time against parties to the assignment and against the debtor and other third parties. However, it was pointed out that paragraph (3) should make it clear that it was not intended to affect the rights of third parties, in

particular in case of insolvency of the assignor. While the Working Group generally agreed that the draft convention should not unduly interfere with the law of insolvency, it felt that the issue might need to be discussed further in the context of draft article 18 (see paras. 254-258). It was generally agreed that wording along the lines of "without prejudice to the provision on priorities" might be added at the beginning of paragraph (3).

112. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (3), including possible variants reflecting the various decisions and suggestions made.

Article 8. No-assignment clauses

113. The text of draft article 8 as considered by the Working Group was as follows:

"(1) "Variant A

"An assignment transfers the receivables to the assignee notwithstanding any agreement between the assignor and the debtor prohibiting or restricting such assignment. Nothing in this article affects any obligation or liability of the assignor to the debtor in respect of an assignment made in breach of a no-assignment clause, but the assignee is not liable to the debtor for such a breach.

"Variant B

"An agreement between the assignor and the debtor prohibiting or restricting assignment of receivables is invalid. An assignment transfers the receivables to the assignee notwithstanding such an agreement. Neither the assignor nor the assignee shall have any liability for breach of such an agreement.

"[(2) This article does not apply to the assignment of consumer receivables.]"

Paragraph (1)

114. The Working Group noted that draft article 8 was aimed at covering contractual but not statutory prohibitions of assignment. In addition, it was noted that variant A was aimed at: providing certainty as to the validity of an assignment made in breach of a no-assignment clause; and at ensuring that, while the debtor might recover from the assignor any damage suffered as a result of the assignment, that remedy would not be available against the assignee, since otherwise the assignment could be deprived of any value. Moreover, it was noted that variant B, which was inspired by article 9-318(4) of the United States Uniform Commercial Code (UCC), took a more radical approach in that it invalidated a no-assignment clause with the result that an assignment effected in breach of a no-assignment clause would be valid, while the violation of that clause would not give rise to any liability.

115. The Working Group exchanged views as to whether draft article 8 should be retained. One view was that draft article 8 should be deleted altogether, since anti-assignment and similar clauses agreed upon by creditors and debtors were a matter of contract (i.e., the original contract), and should not be dealt with in the draft convention. In addition, it was pointed out that draft article 8 failed to address other contractual clauses, which, while falling short of being anti-assignment

clauses in a narrow sense, could result in prohibiting assignments (e.g., confidentiality clauses). The prevailing view, however, was that draft article 8 should be retained, since anti-assignment clauses were often included in contracts and posed an obstacle to receivables financing in that they created uncertainty as to the validity of the assignment, thus increasing the cost of credit. As to confidentiality clauses, it was generally felt that potential conspiracies between assignors and assignees to violate such clauses contained in agreements between assignors and debtors should remain outside the scope of draft article 8.

116. Having decided to retain draft article 8, the Working Group turned to variants A and B. The discussion focused on variant A, since it was generally felt that, while variant B might provide more certainty, it interfered excessively with party autonomy, by tilting the balance of interests in favour of the assignee.

117. The validity of assignments made in violation of anti-assignment clauses was found to be generally acceptable, despite the fact that, under some national laws, such assignments were considered as being invalid. At the same time, however, it was recognized that some exceptions would need to be made to the rule contained in variant A, in order to uphold anti-assignment clauses in certain special cases, e.g., in case of contracts with Governments or in syndicated credit agreements. In that connection, it was observed that in such cases an assignment might not be invalid as between the assignor and the assignee, as long as no obligation was created for the debtor thereby.

118. As to the liability of the assignee towards the debtor for violation of an anti-assignment clause agreed upon between the assignor and the debtor, which was excluded under variant A, differing views were expressed. One view was that releasing the assignee from liability towards the debtor might result in the debtor having to pay the assignee, while being unable to recover from the assignor damages suffered by the debtor as a result of the assignment. Such a situation might arise, for example, if the assignor had, in the meantime, become insolvent. In addition, it was pointed out that such an approach might unduly restrict the autonomy of the parties to agree that certain receivables arising between them were not assignable, and would, in addition, be inconsistent with the approach taken in a number of national legal systems.

119. The prevailing view, however, was that extending the liability of the assignor for violating an anti-assignment clause, to the assignee would result in assignees having to examine a large number of contracts in order to ascertain whether they included anti-assignment clauses or not. In addition, it was stated that such an approach would result in receivables arising from contracts that contained anti-assignment clauses being rejected or accepted by assignees at a substantially reduced price, which would adversely impact on the amount of credit available to assignors and debtors.

120. In order to counterbalance the validity of an assignment made in violation of an anti-assignment clause and the absence of liability of the assignee, on the one hand, with the need to protect the debtor, on the other hand, a number of suggestions were made. One suggestion was that the debtor should be able to discharge its obligation by paying the assignor. It was noted that article 16 of the Code of International Factoring Customs promulgated by Factors Chain International followed a similar approach, in that the assignor was allowed to receive payments as an agent of the assignee. However, it was observed that, while such an approach could be acceptable within a group of financing institutions subscribing to the same code of conduct, it could not find general application, since it could defeat the ability of the assignee to rely on the assigned receivables.

121. Another suggestion was that knowledge on the part of the assignee of the existence of an anti-assignment clause (e.g., a negative pledge) should be made a condition of the validity of assignments made in violation of anti-assignment clauses or, at least, that such knowledge should entitle the debtor to discharge its obligation by paying the assignor. The suggestion to "penalize" the assignee for accepting an assignment in violation of a known anti-assignment clause was opposed on the ground that it would inadvertently result in encouraging the assignee to avoid a due-diligence test, since, if the assignee was diligent, it would find out that an anti-assignment clause existed, and would not accept the receivables, or would accept them at a substantially reduced value. In addition, it was pointed out that, while making business practice conform to somehow higher good faith standards was an important goal, that should not be made at the expense of certainty, which would be the case if knowledge of the assignment on the part of the assignee would invalidate the assignment or deprive the assignee of the right to collect.

122. After discussion, the Working Group decided that variant A should be retained unchanged.

Paragraph (2)

123. It was noted that paragraph (2), which appeared within square brackets pending determination of the approach to be followed by the Working Group with regard to consumer protection, was intended to leave the validity and effectiveness of anti-assignment clauses contained in consumer contracts outside the scope of draft article 8. In addition, it was noted that an alternative approach might be to cover anti-assignment clauses in a consumer context, subject to the applicable consumer protection law, and to strengthen that protection, for example by providing that, in a consumer context, unless the parties agreed otherwise, payment of the assigned receivables should always be made to the bank account designated by the assignor and the debtor (draft article 19).

124. The view was expressed that, while the principle of consumer protection embodied in paragraph (2) was an important principle, paragraph (2) created a number of concerns, including that: it was based on the assumption that consumers had a power to negotiate and to include anti-assignment clauses in their contracts, which might not be realistic; and that in practice it was very difficult to distinguish which receivables in a pool of receivables assigned were or were not owed by consumers. In order to address those concerns, the suggestion was made that an approach along the lines of article 1.2(a) of the Factoring Convention should be followed. It was noted that the Factoring Convention did not apply to receivables arising from contracts of sale of goods if the goods were bought for personal, family or household use. That suggestion was opposed on the ground that such an approach would not improve the position of consumer-debtors, since, while it would not increase their negotiating power, it would fail to increase the availability of lower cost credit. In addition, it was noted that following the approach taken in the Factoring Convention would be inappropriate, since the Factoring Convention was not intended to cover securitization transactions, in the context of which credit was raised at a lower cost in financial markets through the sale of securities backed, e.g., by large numbers of small-amount consumer receivables.

125. Another suggestion made in order to address the above-mentioned concerns was that in a consumer context, the debtor-consumer should be allowed to discharge its obligation by paying the assignor. In support of that suggestion, it was pointed out that such an approach would protect the debtor from uncertainty as to whom to pay or from having to deal with a new, possibly foreign, creditor, without negatively impacting on securitization transactions, in which payment to the assignor was normal practice. That suggestion too was objected to on the grounds that it could negatively affect a number of practices in which, in return for the assigned receivables, the assignee

provided not financing but related services, including collection and accounting services. However, it was agreed that payment to a bank account or post-office box, in particular in a consumer context, should be further considered in the context of draft article 19. As a matter of drafting, it was suggested that the reference to "consumer receivable" might be usefully clarified to indicate that it was intended to cover receivables owed by consumers.

126. After discussion, the Working Group decided to delete paragraph (2). It was agreed that the issue of consumer protection and the definition of "consumer receivable" would need to be further discussed in the context of draft article 19.

Article 9. Transfer of security rights

127. The text of draft article 9 as considered by the Working Group was as follows:

> "Unless otherwise provided by a rule of law or by an agreement between the assignor and the assignee, an assignment transfers to the assignee the rights securing the assigned receivables without a new act of transfer."

128. It was noted that draft article 9 reflected the principle of automatic transfer of security rights, subject to a contrary statutory or contractual provision, which had been broadly supported at the previous session of the Working Group (A/CN.9/420, para. 74).

129. It was generally felt that draft article 9 should cover both personal (e.g., guarantees) and proprietary security rights (e.g., pledges, mortgages). As a matter of drafting, the suggestion was made that the reference to "rule of law" should be aligned with the relevant wording contained in articles 6, 7, 8 and 10 of the UNCITRAL Model Law on Electronic Commerce. Support was expressed in favour of allowing parties to exclude the automatic transfer of rights securing the assigned receivables. The example of a mortgage securing the assigned receivables was mentioned, in which case the assignee might have an interest in excluding by agreement the automatic transfer of the mortgage, since real estate property rights involved costs and risks (e.g., maintenance, taxation, insurance).

130. After discussion, the Working Group found the substance of draft article 9 to be generally acceptable, and requested the Secretariat to prepare a revised draft, taking into account the suggestions made.

CHAPTER III. RIGHTS, OBLIGATIONS AND DEFENCES

Article 10. Determination of rights and obligations

131. The text of draft article 10 as considered by the Working Group was as follows:

> "[(1) The rights and obligations of the assignor and the assignee arising from their agreement are determined by the terms and conditions set forth in that agreement, including any rules, general conditions or usages specifically referred to therein, and by the provisions of [this Convention] [this Law].

"(2) The rights and obligations of the assignor and the debtor arising from the original contract are determined by the terms and conditions set

forth in that contract, including any rules, general conditions or usages specifically referred to therein, and by the provisions of [this Convention] [this Law].

"(3) The priority between several assignees who obtained the receivables from the same assignor, as well as between the assignee and creditors of the assignor including, but not limited to, the administrator in the insolvency of the assignor, is determined, subject to the provisions applicable to the insolvency of the assignor, by the provisions of [this Convention] [this Law].

"[(4) In interpreting the terms and conditions of the assignment, the underlying financing contract, if any, and the original contract and in settling questions that are not addressed by their terms and conditions or by the provisions of [this Convention] [this Law], regard shall be had to generally accepted international rules and usages of receivables financing practice.]]"

132. It was noted that draft article 10, which was a new provision, modelled on article 13 of the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, and appeared within square brackets, was intended to clarify the relationship between the draft convention, other rules of law and party autonomy.

Paragraph (1)

133. The Working Group noted that paragraph (1) recognized party autonomy with regard to the rights and obligations of the assignor and the assignee. The concern was expressed that, while a provision along the lines of paragraph (1) was appropriate for standardized contractual relations such as those addressed in the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit, it might cause uncertainty in the context of assignment, which involved a great variety of contractual relationships.

134. A number of observations and suggestions were made as to the exact formulation of the principle embodied in paragraph (1). One observation was that paragraph (1) should distinguish between the rights and obligations of the assignor and the assignee arising from their contractual relationship and those arising from the provisions of the draft convention. It was suggested that, in case of conflict between those two sources of rights and obligations, the provisions of the draft convention should prevail. Another observation was that paragraph (1) unnecessarily derogated from the normal rule of contract interpretation that lacunae in contracts could be filled by reference to trade usages, even if they were not "specifically" referred to in the contract. It was stated that the situation might be different in the case of independent bank guarantees and stand-by letters of credit, where the reference to trade usages was relevant to the determination of the extent of the commitment accepted in the undertaking and had, therefore, to be specific. Accordingly, it was suggested that the word "specifically" be deleted.

135. Yet another observation was that paragraph (1) did not make it sufficiently clear that the rights and obligations of the assignor and the debtor were to be determined by reference to the applicable law, which would include the draft convention, if the conditions for its application were met.

136. After deliberation, the Working Group decided to retain paragraph (1) within brackets and requested the Secretariat to prepare a revised draft, taking into account the observations and suggestions made.

Paragraph (2)

137. The Working Group agreed that paragraph (2) should be deleted. Several reasons were cited in support of deletion, including: that paragraph (2) dealt with the assignor-debtor relationship, which was outside the scope of the draft convention; that it was not possible to cover in one provision all the possible sources of receivables, some of which were already covered by existing rules of contract interpretation (e.g., the United Nations Sales Convention); and that, in view of the decision of the Working Group to cover international assignments of domestic receivables, paragraph (2) might result in different laws being applicable to the assignor-debtor relationship, depending on whether the assignment was to a foreign or to a domestic assignee.

Paragraph (3)

138. While the Working Group was in agreement with the principle embodied in paragraph (3), doubts were expressed as to its placement in the context of draft article 10. The view was widely shared that paragraph (3) addressed an issue of paramount importance, i. e., the relationship between the draft convention and the rules applicable to the insolvency of the assignor. It was observed that recognizing the validity of bulk assignments of future receivables as concerns the administrator in the insolvency of the assignor should be one of the main goals of the text being prepared. Noting that the issue was addressed in the context of draft article 18, the Working Group decided to defer its discussion on the matter until it had completed its consideration of draft article 18.

139. The suggestion was made that, in order to facilitate the consideration of the relationship between the draft convention and the rules applicable in case of insolvency by the Working Group, the Secretariat should prepare a list of questions that might need to be addressed. In that connection, it was observed that certain assignment-related issues might be addressed by rules of the law applicable to insolvency and that the Hague Conference intended to prepare a paper on conflict-of-laws issues on assignment, which would also address conflict-of-laws issues relating to insolvency.

140. The Working Group decided to retain paragraph (3) within brackets, pending discussion of draft article 18, and requested the Secretariat to consider placing it at the appropriate place in the revised draft to be considered at a future session.

Paragraph (4)

141. It was widely felt that paragraph (4) embodied an extremely important principle, namely the need to take into account the commercial finance context in the interpretation of assignment. However, the concern was expressed that referring, for the purpose of interpretation of the assignment, to a body of trade usages that did not exist or was not generally recognized could introduce uncertainty.

142. The Working Group exchanged views as to the relationship between paragraph (4) and draft article 4(2). One view was that the two provisions were dealing with the same issue and that

paragraph (4) should be deleted. Another view was that the two provisions addressed two distinct issues, paragraph (4) gap-filling in the assignment and draft article 4 (2) gap-filling in the draft convention. It was thus suggested that both provisions should be retained. Yet another view was that, while paragraph (4) and draft article 4(2) were intended to address different issues, there was potential for overlap between the two provisions in certain cases. The example was given of the case in which both the draft convention and the assignment left an issue unsettled. As was pointed out, under draft article 4(2) that issue would have to be settled by reference to the general principles underlying the draft convention and, in the absence of such principles, by reference to the conflict-of-laws rules. At the same time, under paragraph (4), the same matter would be settled by reference to "generally accepted international rules and usages". It was, therefore, suggested that paragraph (4) should be aligned with draft article 4(2).

143. As a matter of drafting, it was suggested that the reference to the underlying and the original contract should be deleted, since those contracts fell outside the scope of application of the draft convention.

144. After deliberation, the Working Group decided to retain paragraph (4) and requested the Secretariat to prepare a revised draft, taking into account the suggestions made.

Article 11. Warranties of the assignor

145. The text of draft article 11 as considered by the Working Group was as follows:

> "(1) Unless otherwise explicitly agreed between the assignor and the assignee, the assignor represents that the assignor is, at the time of assignment, or will later be, the creditor, and that the debtor does not have, at the time of assignment, defences that would deprive the assigned receivables of value.
>
> "(2) Unless otherwise explicitly agreed between the assignor and the assignee, the assignor does not represent that the debtor will perform its payment obligation under the original contract."

146. The Working Group first considered the question whether draft article 11 should be retained. In support of deletion, it was stated that undertakings between the assignor and the assignee were a matter of contract and should be left to be settled by the parties. The prevailing view, however, was that article 11 was useful and should be retained. In support of retention, it was observed that, while the types of warranties given by the assignor to the assignee were a matter of contract, it was useful to include a default rule addressing the question of warranties in the absence of a relevant provision in the assignment.

Title

147. The suggestion was made that, for consistency in terminology with the text of draft article 11, terms such as "representations" or "undertakings" should be used in the title instead of the term "warranties".

Paragraph (1)

148. The Working Group noted that paragraph (1), which merged paragraphs (1) and (2) of the earlier draft, was intended to recognize party autonomy in the allocation of risks between the assignor and the assignee for defences of the debtor that were unknown to the assignee and, at the same time, to allocate that risk in the absence of agreement by the parties.

149. The view was expressed that the representations referred to in paragraph (1) fell into two categories, namely, representations as to the ownership in the receivables and representations as to the existence of defences of the debtor under the original contract between the assignor and the debtor. While the first category of representations was found to be generally acceptable, possibly subject to limitation of its scope to cases of fraud, the second category was said to raise a number of concerns. One concern was that it could be construed more widely than intended and, in particular, as requiring the assignors to promise to assignees that the contracts from which future receivables would arise would be valid and enforceable. Another concern was that manufacturers-assignors were said to be reluctant in practice to promise, for example, that the products they manufactured were free from defects that could give rise to defences on the part of buyers-debtors. Such a warranty would thus either be unnecessary and parties would exclude it by agreement, or insufficient and parties would need to further develop it into a more sophisticated one. Yet another concern was that, in its present formulation, paragraph (1) could inadvertently result in allowing the parties to exclude liability of the assignor for hidden defences that deprived the receivables of any value, which was said to be inappropriate. In order to address those concerns, the suggestion was made to delete from paragraph (1) the warranty as to defences of the debtor.

150. However, support was expressed for retaining that warranty. It was observed that the warranty would take effect only if the parties had not dealt in their agreement with the issue of allocation of the risk for unknown defences of the debtor. In addition, it was stated that the allocation of that risk in paragraph (1) was a reasonable one, since it was within the control of the assignor to perform the original contract well and to avoid giving rise to defences of the debtor, and since, in any case, the assignor was in a better position to know whether the debtor had any defences. In that connection, it was pointed out that an implied warranty as to defences of the debtor would result in a greater degree of accountability of the assignor for performing its contract with the debtor. Such an approach was said to be particularly useful, for example, in the context of contracts for the sale of goods in which service and maintenance elements were to be included. It was pointed out that, if the seller-assignor left the goods to deteriorate, that conduct would give rise to defences on the part of the debtor, and the assignee would not be able to do anything to prevent that result. In view of the above, it was stated that a risk-allocation along the lines of paragraph (1) would facilitate receivables financing, since it would provide more certainty as to whether the assignee would be able to collect from the debtor.

151. As to the question whether the warranty in paragraph (1) needed to be explicit or could also be implied, it was recalled that, at the previous session of the Working Group, the concern had been expressed that the assignor and the assignee should not be allowed to vary the content of the warranty as to the existence of the receivables, which flowed from the basic obligation to act in good faith, or that, at least, the warranty could be varied only by way of an explicit agreement between the assignor and the assignee (A/CN.9/420, para. 83). It was also recalled that the right of the parties to exclude, implicitly or explicitly, the warranty as to defences of the debtor had been cited as one of the reasons in favour of the suggestion to delete that warranty (see para. 149).

152. It was suggested, however, that the reference to an explicit agreement of the parties should be deleted. In support of that suggestion, it was noted that the warranty contained in paragraph (1) was a matter of contract and the parties should be free to deal with that matter, explicitly or implicitly. In addition, it was noted that an explicit agreement would be necessary only if the debtor and third parties were to be affected, which was not the case with the warranty provided for in paragraph (1).

153. As to the formulation of paragraph (1), several suggestions were made. One suggestion was that it should be made clear that the term "defences" also covered counterclaims and set-offs. Another suggestion was that paragraph (1) should be revised to make clear that it referred to defences that could defeat, in whole or in part, the right of the assignee to collect.

154. With regard to the question whether a fundamental breach of warranties by the assignor would result in the automatic avoidance of the assignment and in the automatic transfer of the receivables back to the assignor, without a new act of transfer, the Working Group agreed that that was a matter involving remedies for breach of contract, which should be left to the applicable domestic law.

155. After discussion, the Working Group decided that the word "explicitly" should be deleted, that the warranty as to the defences of the debtor should be placed within square brackets and that the reference to the value of the receivables should be redrafted with a view to clarifying its meaning.

Paragraph (2)

156. The suggestion was made that paragraph (2) should be revised so as to provide that, apart from the warranty in paragraph (1), there were no other warranties between the assignor and the assignee. That suggestion was objected to on the ground that there might be other sources of obligations between the parties, beyond their agreement and paragraph (1), e.g., trade usages referred to in draft article 10(4). In addition, the suggestion was made that, although requiring an explicit agreement for a warranty as to the solvency of the debtor was more justified than requiring such an explicit agreement for the exclusion of the warranty in paragraph (1), on balance, it would be better to delete the word "explicitly" and leave the matter to the rules on contract interpretation. Moreover, it was suggested that, for the same reasons cited in the discussion of paragraph (1), paragraph (2) should also be placed within brackets.

157. As a matter of drafting, it was suggested that, in line with the decision of the Working Group to cover the assignment of non-contractual receivables, the reference to the original contract should be deleted.

158. After discussion, the Working Group found the substance of paragraph (2) to be generally acceptable and decided that the reference to an "explicit" agreement and to the original contract should be deleted.

Article 12. Assignee's right to notify the debtor and to receive payment

159. The text of draft article 12 as considered by the Working Group was as follows:

"(1) Unless otherwise provided in the agreement between the assignor and the assignee, the assignee is entitled to notify the debtor pursuant to article 13 and to request payment of the receivables assigned at the time agreed upon with the assignor and, in the absence of such an agreement, at any time.

"(2) If the assignor fails to perform its obligation to pay under the financing contract, the assignee is entitled to notify the debtor and to request payment.

"(3) If agreed by the assignor and the assignee or required by law:

"(a) The assignee who receives payment from the debtor must account for any amount received in excess of the obligation secured by the assignment; and

"(b) The assignor remains liable for any amount by which the payment received by the assignee from the debtor falls short of the obligation secured by the assignment."

Paragraph (1)

160. It was noted that under paragraph (1), the assignee was allowed to notify the debtor and to request payment at any time, unless otherwise agreed between the assignor and the assignee. Some doubt was expressed as to whether it was appropriate to provide that the right of the assignee to notify the debtor might be restricted by agreement. However, it was generally felt that restrictions to the right of the assignee to notify the debtor and to request payment were a matter of contract to be negotiated between assignors and assignees.

161. A number of suggestions of a drafting nature were made, including: that for consistency with the text of paragraph (1), the title of draft article 12 should be revised along the following lines: "Assignee's right to notify and to request payment"; and that paragraph (1) should end with the words "receivables assigned", while the remaining words could be deleted, the meaning of the rule contained in paragraph (1) remaining unchanged.

162. After discussion, the Working Group found the substance of paragraph (1) to be generally acceptable, subject to the suggested drafting modifications.

Paragraph (2)

163. The Working Group agreed to delete paragraph (2). It was generally felt that the right of the assignee to notify the debtor and to request payment should not be restricted along the lines suggested in paragraph (2), and that it should, in any case, be subject to agreement between the assignor and the assignee.

Paragraph (3)

164. Doubts were expressed as to the usefulness of paragraph (3). It was stated that paragraph (3), as currently drafted, did not add anything new to what could be agreed by the parties or provided by existing law. It was observed that, even if the opening words of paragraph (3) were rephrased to read "unless otherwise provided by agreement or by law", paragraph (3) would not serve a useful purpose, since the type of assignment involved in each particular case would depend on the

agreement of the parties and no attempt should be made to solve that question by way of a general default rule. After consideration, the Working Group decided to delete paragraph (3).

Article 13. Debtor's duty to pay

165. The text of draft article 13 as considered by the Working Group was as follows:

"(1) The debtor is entitled, until the debtor receives notification in writing of the assignment in accordance with paragraph (2) of this article, to pay the assignor and be discharged from liability.

"(2) The debtor is under a duty to pay the assignee if:

"(a) the debtor receives notification in writing of the assignment by the assignor or by the assignee;

"(b) the notification contains an unequivocal request for payment and reasonably identifies the receivables assigned, whether existing or future at the time of notification, and the person to whom or for whose account the debtor is required to make payment; and

"(c) the debtor has not received notification in writing of a prior assignment, or of measures aimed at attaching the assigned receivables, including but not limited to judgements or orders issued by judicial or non-judicial bodies, as well as of measures effected by operation of law, in particular in case of insolvency of the assignor.

"(3) If requested by the debtor, the assignee must furnish within a reasonable period of time adequate proof that the assignment has been made, and unless the assignee does so, the debtor may pay the assignor and be discharged from liability.

"(4) In case the debtor receives notifications of more than one assignment of the same receivables made by the same assignor, the debtor is discharged from liability by payment to the first assignee to notify in accordance with paragraph (2) of this article and has against the assignee the defences provided for under article 14.

"(5) Irrespective of any other ground on which payment by the debtor to the assignee discharges the debtor from liability, payment by the debtor to the assignee discharges the debtor from liability if made in accordance with this article."

Paragraph (1)

166. It was noted that under paragraph (1) the debtor, before receiving notification as provided by paragraph (2), had the right to pay the assignor as required by the original contract and be discharged of its obligations under that contract. At the same time, it was noted, the debtor could pay the assignee, bearing the risk, however, that it might have to pay twice if it subsequently turned out that the assignee was not the rightful creditor. In such a case, it was observed, the debtor would have a particular interest in making use of the right recognized under paragraph (3) to request adequate proof of the assignment. It was also observed that the provisions of the applicable law relating to fraud and the principle expressed in draft article 4 that good faith should be

observed in international trade were implicit limitations of the right of the debtor to discharge its obligation by paying the assignor before notification.

167. While some doubt was expressed as to the usefulness of retaining paragraph (1), the prevailing view was that paragraph (1) was necessary in order to provide a clear discharge rule for the debtor paying the assignor before notification. The Working Group exchanged views as to whether knowledge of an assignment should have the same result as notification, namely to preclude the debtor from discharging its obligation by paying the assignor.

168. One view was that mere "knowledge" of an assignment on the part of the debtor should be recognized as an alternative way of triggering the debtor's obligation to pay the assignee. In support of that view, it was argued that it would run counter to good faith to allow the debtor to pay the assignor in cases where the debtor actually knew of the assignment, e.g., by way of oral notification. The suggestion was made that, if knowledge of an assignment were not to be treated in the same way as notification, paragraph (1) should, at least, be revised so as to ensure that only the notification of a valid assignment could preclude the debtor from discharging its obligation by paying the assignor.

169. Another view was that the duty of the debtor to pay the assignee should be triggered only by notification of the assignment. It was stated that a notification approach was essential for the protection of the debtor, which was the main purpose of draft article 13, in particular in order to ensure that there would be no doubt as to whom the debtor should pay in order to obtain discharge. In that connection, it was observed that such an approach was in line with a principle of paramount importance for the protection of the debtor, and explicitly embodied in draft article 6 (1) (b), i.e., that the legal position of the debtor should not be changed as a result of the assignment.

170. In addition, it was stated that a rule along the lines of paragraph (1) reflected what should be regarded as proper behaviour of the debtor before notification. It was also stated that such a rule was in line with normal business practice, even if the debtor had received an oral notification or had actual knowledge of the assignment. It was recalled that, in practice, parties often intended the debtor to continue making payments to the assignor until, or even after, notification was given. The example was given of securitization transactions in which it was customary for the debtor to have knowledge or notification of the assignment but to continue making payments to the assignor, since the assignee was a special corporation established for the sole purpose of issuing and selling securities, without being equipped with a structure geared to receiving payments of the assigned receivables.

171. Moreover, it was stated that, while making business practice conform to good faith standards was an important goal, this should not be at the expense of certainty, which would be the case if mere knowledge of the assignment were to trigger the debtor's duty to pay the assignee. In that regard, it was noted that a number of questions would need to be addressed, including what constituted knowledge, who had to prove knowledge, what the content of knowledge had to be and how knowledge of the assignment should be treated in case of several conflicting assignments.

172. As a matter of drafting, the suggestion was made that paragraph (1) should refer to payment by the debtor under the terms and conditions of the original contract. The suggestion was also made that, in order to cover non-contractual receivables, a reference should be added in paragraph (1) to their source as well.

Paragraph (2)

Chapeau

173. Concerns were expressed as to both the substance and the formulation of the chapeau. As to the substance, one concern was that the debtor's duty to pay was not only subject to notification, but was mainly subject to the original contract and to the absence of defences and set-offs set forth in draft article 14. As to the formulation, the concern was that the chapeau might be misread as making notification a condition of validity of the assignment and the debtor's duty to pay. Another concern was that requiring payment to be made to the assignee could preclude parties from agreeing that payment should be made to the assignor or to a third party.

174. In order to address those concerns, a suggestion was made that the chapeau should be recast to limit the scope of paragraph (2) to cases where a "valid" notice of assignment had been received. Under that suggestion, subparagraphs (a) and (b) should be regarded as stating the minimum requirements for a valid notice, and the location of subparagraph (c) should be reconsidered. Broad support was expressed in favour of that suggestion. An additional suggestion, which did not attract sufficient support, was that the debtor should be provided with the possibility of seeking the guidance of the competent court in those cases where it might be faced with conflicting allegations of assignors and assignees or other parties (see paras. 199-201).

Subparagraph (a)

175. The Working Group found the substance of subparagraph (a) to be generally acceptable. The concern was expressed, however, that, should the assignee be allowed to notify the debtor independently of the assignor, the debtor might be burdened with the need to request additional proof, or with the risk of misjudging the facts (e.g., as to the existence of a valid assignment) and having to pay twice. The concern was also expressed that, in certain cases, even allowing the assignor to notify independently of the assignee might be inappropriate. The example was given of a case where the assignor, in violation of an arrangement with the assignee that payment should continue to be made to the assignor, notified the debtor and requested that payment should be made to the assignee. In response to that concern, it was observed that, in the case mentioned, it was important that the debtor should be able to discharge its obligation as directed by the assignor, and should not be concerned with the private arrangements that might exist between the assignor and the assignee.

Subparagraph (b)

176. It was generally felt that a notification should contain information about the assignment, the assigned receivables and the identity of the assignee. It was also felt that requiring, in addition, that the notification contain an unequivocal request for payment was unnecessary. As an alternative, it was suggested that consideration might be given to requiring that the notification include payment instructions. That suggestion was opposed on the ground that matters such as place, time and method of payment were better left to the contract between the assignor and the assignee and to otherwise applicable law.

177. The Working Group agreed in principle that notification of an assignment could relate to future receivables. The suggestion was made, however, that the validity of a notification relating to future receivables should not be unlimited in time. The Working Group also agreed that the

notification should identify the person to whom the debtor should pay. In that connection, a concern was expressed that such a rule could have an impact on the law applicable to the debtor's obligation and on court jurisdiction. If the new creditor identified in the notification was a person located in a country other than the country of the debtor, the draft convention would apply and not the domestic law of the debtor's country or the otherwise applicable law. In response, it was observed that that concern was addressed by a number of provisions in the draft convention, which were aimed at ensuring that the debtor's legal position would not be negatively affected as a result of the assignment (e.g., draft articles 6 (1) (b), 13, 14, 17(2) and 19).

Subparagraph (c)

178. There was broad support in the Working Group for the principle embodied in subparagraph (c) that written notification of a prior assignment or orders of judicial or non-judicial bodies with respect to the assigned receivables should preclude the debtor from discharging its obligation by payment to the assignee giving notification. However, it was generally felt that subparagraph (c) would no longer fit into paragraph (2) if the paragraph was revised to focus on the requirements of a valid notice, rather than on the debtor's duty to pay. It was agreed that a provision along the lines of subparagraph (c) should be placed elsewhere in the text.

179. Based on the suggestions made and concerns expressed with respect to paragraphs (1) and (2) of draft article 13, a proposal was made for a revised version of draft article 13, which read as follows:

"(1) Unless and until the debtor has received a valid notice of assignment, the debtor shall be entitled to a valid discharge of its obligation by payment to the assignor.

"(2) A valid notice of assignment shall:

"(a) be in writing, stating that the assignment has taken place;

"(b) be signed by either the assignor or the assignee;

"(c) identify [sufficiently] [in an appropriate manner] the receivables which have been assigned; and

"(d) specify any relevant requirements for how payment is to be made.

"(3) Upon receipt of a valid notice of assignment, the debtor shall thenceforth owe its assigned obligations to the assignee, subject to paragraph (4) below and to article 14.

"(4) Nothing herein shall affect any obligation which may be imposed on the debtor by any court order in relation to its payment obligations or the right of the debtor to seek directions with respect thereto from any court having jurisdiction."

180. The Working Group decided to continue its discussion of paragraphs (1) and (2) of draft article 13 on the basis of the proposed text.

New paragraph (1)

181. It was generally agreed that new paragraph (1), which changed the focus of draft article 13 from the debtor's duty to pay to the discharge of the debtor, was an improvement over the previous draft. However, a number of concerns were expressed as to the exact formulation of new paragraph (1). One concern was that it might affect the obligation of the debtor to pay under the original contract, in that it could be misread as implying, for example, that the debtor could choose to pay upon notification, even before payment became due under the contract. In order to address that concern, a number of suggestions were made, including: that the debtor's entitlement to a discharge should be made subject to the terms and conditions of the contract; and that a phrase should be added at the end of new paragraph (1) along the lines "in the same manner and time as if assignment had not taken place".

182. Another concern was that the reference to a "valid notice" or to a "valid discharge" might introduce uncertainty, since those terms were not universally understood. Yet another concern was that new paragraph (1) did not make sufficiently clear that it was intended to deal with situations where an assignment was not notified to the debtor and that it did not deal with the remedies available to the assignee to preclude the debtor from paying the assignor. After discussion, it was agreed that draft article 13 was not the appropriate place to deal with those concerns and that they might need to be taken up in a different context, e.g., draft article 14, which dealt with defences of the debtor.

183. A number of drafting suggestions were made, including: that the title of draft article 13 should be revised so as to refer to the discharge of the debtor; and that paragraph (1) should clearly indicate that it dealt with cases in which there was an assignment but not a notification of the debtor.

184. After discussion, the Working Group found the substance of new paragraph (1) to be generally acceptable and requested the Secretariat to prepare a revised draft, taking into account the concerns expressed and the suggestions made.

New paragraph (2)

Chapeau

185. For the reason mentioned in the context of the discussion of new paragraph 1, it was agreed that the reference to the validity of the notice should be deleted (see para. 182). As a result, it was suggested that the chapeau should read as follows: "For the purposes of this article, notice means:".

New subparagraphs (a) and (b)

186. The concern was expressed that reference to signature in subparagraph (b) introduced an unnecessary degree of formalism and failed to take into account that the definition of "writing" contained in draft article 2 (6) covered both form and requirements of authentication. After discussion, the Working Group decided that new subparagraphs (a) and (b) should be merged into a single subparagraph, along the lines of draft article 13(2)(a) as presented in the note by the Secretariat (A/CN.9/WG.II/WP.87).

New subparagraph (c)

187. The Working Group found the substance of new subparagraph (c) to be generally acceptable. On that basis, the Secretariat was requested to prepare a revised draft that would refer to the possibility of notification being given in relation to future receivables, subject to some time-limitation, and to the identification of the person to whom the debtor would have to pay, along the lines of draft article 13 (2) (b) as presented in the note by the Secretariat.

New subparagraph (d)

188. It was generally felt that new subparagraph (d) could inadvertently result in interfering with the law of the country in which payment was to be made, and that it could be misread as giving the assignee the right to modify the payment terms existing under the contract between the assignor and the debtor. After discussion, the Working Group decided to delete new subparagraph (d).

New paragraph (3)

189. Several concerns were raised with regard to new paragraph (3). One concern was that it could have the unintended result of making notification a condition of validity of the assignment. Another concern was that new paragraph (3) did not sufficiently address the situation in which the notification was in accordance with draft article 13 but the assignment was invalid, e.g., because of fraud between the assignor and the assignee, falsification of an assignment or lack of authority of the person signing the assignment. In order to address that concern, it was suggested that new paragraph (3) should be revised to provide that the debtor would not be discharged by paying the assignee if the assignment was invalid and, in particular, if the debtor knew of the invalidity of the assignment. It was widely felt, however, that the debtor should not be burdened with the need to make a determination as to the legal validity of the assignment. It was explained that, while the debtor could be expected to establish that assignment had taken place as a matter of fact, it could not be required to determine that assignment was valid as a matter of law.

190. In order to avoid introducing doubts as to whether the debtor could discharge its obligation by paying the assignee, the suggestion was made that it might be sufficient to state in new paragraph (3) that the debtor was discharged if it acted in good faith. Alternatively, it was suggested, the matter should be left to the applicable domestic law to be determined in accordance with draft article 22. In that connection, it was observed that references to "the assignor" and "the assignee" indicated that draft article 13 appeared to be predicated on the assumption that cases in which there was no valid assignment were not covered.

191. Another suggestion was that the matter might be sufficiently dealt with by a provision requiring that the assignee should be able to notify the debtor only with the authority of the assignor, a provision which the Working Group had decided to delete at its previous session (A/CN.9/420, paras. 119 and 120). It was stated that a distinction should be drawn between notifications of assignments given by assignors and notifications given by assignees. In the former case, it was observed, the invalidity of the assignment should not preclude the debtor from discharging its obligation by paying the assignee, since the assignor, having given the notification, should be estopped from raising the invalidity of the assignment. In the latter case, it was added, the debtor should not be discharged if it paid the assignee. Yet another suggestion was that, instead of making the validity of the assignment a condition for the validity of the notification, the notification should be required to include "adequate proof" of the assignment. It was observed that

while market practice could accommodate all types of notification, it was important to avoid complicating the notification process with excessive requirements, since such an approach would have an adverse impact on the cost of credit.

192. After discussion, the Working Group decided that new paragraph (3) should be restructured to provide a clear rule, along the lines of draft article 13 (5) as presented in the note by the Secretariat, for the discharge of the debtor's obligation in case of notification. In addition, new paragraph (3) should refer to the absence of prior notification of an assignment or of "measures aimed at attaching the assigned receivables, as well as of measures effected by operation of law", along the lines of draft article 13 (2) (c) as presented in the note by the Secretariat. Moreover, the Working Group requested the Secretariat to present alternative provisions with regard to discharge of the debtor in case of notification of an invalid assignment.

New paragraph (4)

193. The Working Group noted that the first provision of new paragraph (4) ("Nothing herein shall affect any obligation which may be imposed on the debtor by any court order in relation to its payment obligations") dealt with the issue addressed in draft article 13 (2) (c) as presented in the note by the Secretariat. It was agreed that that first provision should be deleted, in view of the decision of the Working Group to retain the principle expressed in draft article 13(2)(c).

194. As to the second part of new paragraph (4) ("Nothing herein shall affect the right of the debtor to seek directions with respect to its payment obligations from any court having jurisdiction"), the Working Group felt that it dealt with issues that were addressed in more detail in draft article 13 (3) as presented in the note by the Secretariat, and should be addressed in that context (see paras. 195-202).

Paragraph (3)

195. There was general agreement that the principle embodied in paragraph (3), i.e., that the debtor should have a right to request proof of the assignment and that, should no such proof be provided, the debtor would be allowed to pay the assignor and be discharged from its obligation to pay, was acceptable.

196. A question was raised as to whether proof of the assignment under paragraph (3) should be sought from the assignee only, or whether it could also be requested from the assignor. It was suggested that information as to a possible change in the identity of the payee would normally be sought by the debtor from the assignor. Another suggestion was that a solution to that question might be found if the draft convention were to provide that notification of the assignment should be given both by the assignor and the assignee, whether as a joint notification or separately in two distinct notifications. The suggestions were objected to on the ground that it might be in the interest of the assignor not to provide the debtor with proof of the assignment, particularly in view of the fact that, failing to obtain such proof, the debtor would be inclined to seek discharge from its obligation by paying the assignor, as provided in paragraph (3).

197. It was generally agreed that, while in some cases it might be advisable for the debtor to consult with the assignor in case of doubt as to whether payment should be made in compliance with a notification of assignment, proof of the assignment should be sought from the assignee only.

After discussion, the Working Group found the substance of paragraph (3) to be generally acceptable.

198. A concern was expressed, however, that the notion of "adequate proof" might be difficult to interpret. In particular, it appeared to burden the debtor with the risk that resulted from the need to determine what might constitute "adequate" or "sufficient" proof. With a view to alleviating that concern, it was suggested that a more objective test (which was described as a "safe harbour clause") should be provided by adding wording along the following lines to the text of paragraph (3): "Adequate proof can be served by the production of any document emanating from the assignor and indicating that the assignment has been made". After discussion, the suggestion was adopted by the Working Group.

199. In the discussion, the view was expressed that, in case of doubt as to the existence or validity of the assignment, additional mechanisms should be introduced in the draft convention to protect the interests of the debtor. One suggestion was that, where the debtor failed to obtain proof of the assignment, it should have an express right to seek directions with respect to its payment obligations from any court having jurisdiction, as suggested in new paragraph (4). As a further addition to the text, it was suggested that, in case of doubt, the debtor should be allowed to discharge its payment obligation through other mechanisms that might be available under the laws of certain countries. For example, discharge could be obtained through payment being made into court, or into a specific public bank account, pending verification as to the existence or validity of the assignment.

200. The attention of the Working Group was drawn to the fact that, whatever mechanism was provided for the protection of the debtor under paragraph (3), it should be compatible with the operation of bulk-assignment systems, where large numbers of small-amount receivables were transferred, and neither the assignor nor the assignee could be expected to make extensive verifications with respect to each individual receivable covered by the transaction. It was stated that, should such verifications become necessary under the draft convention, the costs related to assignment transactions were likely to increase considerably, thus contradicting one of the main objectives of the draft convention, i.e., to enhance the availability of credit and lower the related costs.

201. A widely shared view was that, should more elaborate rules be provided under paragraph (3), they should be limited to certain types of transactions, i.e., transactions involving large-amount assignments, but that they should not apply, for example, to bulk assignments of low-amount receivables. A note of caution was struck about extending the provisions of paragraph (3) to cover the above-mentioned mechanisms, since in many cases such mechanisms might appear impractical, and even detrimental to the situation of the debtor which they purported to protect, particularly if paragraph (3) was to be interpreted as inviting litigation. A suggestion was made that the issue might best be dealt with by way of a general provision recognizing the availability under the draft convention of the mechanisms established by national law for the protection of the debtor. It was generally agreed that the discussion might need to be continued at a future session.

202. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (3), reflecting the various views expressed and suggestions made as possible variants.

Paragraph (4)

203. The Working Group noted that paragraph (4) established a rule with respect to the discharge of the debtor's obligation to pay in situations where the debtor received notification of more than one assignment. It was generally felt that discussion of the issues dealt with in paragraph (4) should be postponed until the Working Group had completed its review of the issue of priority under draft article 18 (see para. 252).

Paragraph (5)

204. The Working Group confirmed its decision that the issues dealt with in paragraph (5) should be addressed in the context of the revised structure of paragraphs (1) and (2).

Article 14. Defences and set-offs of the debtor

205. The text of draft article 14 as considered by the Working Group was as follows:

> "(1) In a claim by the assignee against the debtor for payment of the assigned receivables, the debtor may set up against the assignee all defences arising under the original contract of which the debtor could have availed itself if such claim had been made by the assignor.
>
> "(2) The debtor may assert against the assignee any right of set-off in respect of claims existing against the assignor in whose favour the receivable arose [or claims existing against the assignee] and available
> to the debtor at the time notification of assignment conforming to paragraph (2) of article 13 was given to the debtor.
>
> "[(3) Notwithstanding paragraphs (1) and (2), defences and set-offs that the debtor could have exercised against the assignor for breach of a no-assignment clause are not available to the debtor against the assignee.]"

Paragraph (1)

206. Broad support was expressed in favour of paragraph (1), which reflected an essential principle for the debtor's protection, namely, that the debtor's legal position should not be negatively affected as a result of the assignment, which was also reflected in draft articles 6(1)(b), 17(2) and 19. It was agreed that paragraph (1) covered all defences, including: contractual claims which, in some legal systems, might not be considered "defences"; rights for contract avoidance, e.g., for mistake, fraud or duress; exemption from liability for non-performance, e.g., because of an unforeseen impediment beyond the control of the parties (see United Nations Sales Convention, art. 79); and rights arising from pre-contractual dealings. The attention of the Working Group was drawn to the fact that, in view of the decision of the Working Group to cover non-contractual receivables, the reference to the "original contract" should be expanded so as to possibly refer to the "original obligation". After discussion the Working Group approved paragraph (1) subject to the suggested modification.

Paragraph (2)

207. It was noted that, while paragraph (1) dealt with defences of the debtor arising from the original contract, paragraph (2) was intended to address rights of set-off arising from separate dealings between the assignor and the debtor. In addition, it was noted that the right of set-off of the debtor against the assignee was limited to those rights existing at the time of assignment, in order to protect the assignee from the consequences of dealings between the assignor and the debtor, of which the assignee could have no knowledge.

208. While paragraph (2) was found to be generally acceptable, the concern was expressed that the right of set-off of the debtor against the assignee arising from separate dealings between the debtor and the assignee, which appeared within square brackets, should be available at all times and not only up to the time of notification of the assignment. In order to address that concern, it was generally agreed that the bracketed language should be deleted. Subject to that change, the Working Group found the substance of paragraph (2) to be generally acceptable.

Paragraph (3)

209. It was noted that paragraph (3) was consistent with variant A of draft article 8(1), which the Working Group had decided to retain unchanged. A concern was expressed that paragraph (3) might need to indicate more clearly that it was intended to refer to both defences and set-offs, in order to ensure that the debtor would not be able to assert the breach of a no-assignment clause against an assignee, either as a defence or as an independent claim, on grounds such as interference with contract rights. Doubts were expressed, however, as to whether the breach of the original contract could be raised by the debtor as a set-off. After discussion, the Working Group approved the substance of paragraph (3) and decided that it should be retained without square brackets.

Article 15. Modification of the original contract

210. The text of draft article 15 as considered by the Working Group was as follows:

> "A modification of or a [substitution for] [novation of] the original contract shall be binding on the assignee and the assignee shall acquire corresponding rights under the modified or new contract, provided that it is foreseen in the agreement between the assignor and the assignee or is later consented to by the assignee in writing."

211. It was noted that draft article 15 was a new article, introduced further to a suggestion made at the previous session of the Working Group (A/CN.9/420, para. 109). It was intended to counterbalance, on the one hand, the need to recognize the contractual freedom of the assignor and the debtor to modify their contract in order to address changing commercial realities and, on the other hand, the need to protect the assignee from changes in the original contract that might affect the assignee's rights. It was observed that the effect of draft article 15 would be that, if the assignor and the debtor modified the original contract without the general or specific approval of the assignee, such a modification would not be valid with respect to the assignee.

212. While it was generally agreed that modification of the original contract was an important issue that arose frequently in practice and should be addressed in the draft convention, several

concerns were expressed both as to the substance and as to the specific formulation of draft article 15.

213. One concern was that, in its current formulation, draft article 15 could inadvertently result in eliminating the right of the debtor and the assignor to modify their contract in order to meet their changing needs. In order to limit the effect of what was said to be an excessively strict rule, the suggestion was made that modifications made before notification of the assignment should be treated as binding on the assignee in all cases, while modifications made after notification should be binding on the assignee only if the assignee had given its general or specific consent. In support of such an approach, it was observed that after notification, the assignee became part of a triangular relationship, and its interests should also be taken into account, alongside the interests of the debtor and the assignor. Alternatively, it was suggested that modifications after notification could bind the assignee only if "made in good faith and in accordance with reasonable commercial standards" (see United States Uniform Commercial Code, article 9-318(2)).

214. Another concern was that draft article 15 might, in certain cases, conflict with draft article 14. The example was given of a case in which, under draft article 14, the debtor could raise as a defence the reduction of the price of the goods because of lack of conformity of the goods to contract specifications, while, under draft article 15, that reduction of price could be regarded as a modification of the original contract which would not be binding on the assignee unless it was foreseen in the assignment or the assignee subsequently consented to it. In response, it was observed that draft articles 14 and 15 dealt with different issues and that in the example given, under draft article 15, the debtor could pay to the assignee the reduced price, while the assignee would have recourse against the assignor.

215. As a matter of drafting, it was observed that it was unlikely that the agreement between the assignor and the assignee would contain a clause on modifications of contracts from which the assigned receivables might arise. It was thus suggested that the word "foreseen" should be replaced by the words "not prohibited".

216. In the discussion, the question was raised whether modifications in the assignment after notification should be binding on the debtor or whether a new notification of the modified assignment would be necessary. It was observed that, in line with draft article 13, the debtor was not bound by an assignment unless it had received the corresponding notification. However, a concern was expressed that establishing a duty for a second notification of the debtor about the modification of the assignment after the initial notification could have the unintended effect of increasing the cost of financing transactions involving the bundling of a large number of low-value receivables.

217. After discussion, the Working Group requested the Secretariat to prepare a revised draft of article 15, taking into account the suggestions made and presenting variants as to the way in which the effect of modifications of the original contract on the assignee should be treated. As to the modification of the assignment, the Working Group requested the Secretariat to prepare a draft provision for the consideration of the Working Group at a future session.

Article 16. Waiver of defences

218. The text of draft article 16 as considered by the Working Group was as follows:

"(1) For the purposes of this article a waiver of defences is an explicit written agreement by the debtor with the assignor or the assignee according to which the debtor undertakes not to assert against the assignee the defences that it could raise under article 14.

"(2) A waiver of defences, made at the time of the conclusion of the original contract or thereafter, shall preclude the debtor from asserting defences [the availability of which the debtor knew or ought to have known at the time of waiver].

"(3) The following defences may not be waived:

"(a) defences arising from separate dealings between the debtor and the assignee;

"(b) defences arising from fraudulent acts on the part of the assignee;

"[...]

"(4) A waiver of defences may only be revoked by an explicit written agreement.

"[(5) A written and explicit indication of consent of the debtor to the assignment after notification is deemed to be a waiver of defences.

"(6) The provisions of this article shall not apply to assignments of consumer receivables.]"

Paragraph (1)

219. The Working Group noted that the term "waiver of defences" was defined in paragraph (1) to avoid introducing uncertainty as to its meaning. Views were exchanged as to whether paragraph (1) should cover waivers of defences in general, or whether it should establish a distinction between waivers that might be agreed, before notification, between the debtor and the assignor and waivers agreed, after notification, between the debtor and the assignee.

220. One view was that, while paragraph (1) appropriately covered waivers of defences agreed between the debtor and the assignor, it should not attempt to address waivers of defences agreed between the debtor and the assignee, which should be left entirely to the discretion of the parties. It was stated that none of the substantive provisions contained in paragraphs (2) to (6) were appropriate in the context of the relationship between the debtor and the assignee, since the purpose of those provisions was precisely to limit the freedom of parties as to waivers of defences. It was thus suggested that the words "or the assignee" should be deleted, or that, alternatively, agreements between debtors and assignors might be treated differently in paragraphs (2) through (6) from agreements between debtors and assignees. The prevailing view, however, was that the definition of "waiver of defences" in paragraph (1) should also cover direct agreements that might be concluded between the debtor and the assignee, waiving the right of the debtor to assert against the assignee the defences it might have against the assignor.

221. After discussion, the Working Group found the substance of paragraph (1) to be generally acceptable. The Working Group agreed that, when considering paragraphs (2) to (6), it might need to consider whether the framework established by those paragraphs as to waivers of defences would appropriately cover waivers made between the debtor and the assignee. As a matter of drafting, it

was suggested that the reference to draft article 14 might need to be clarified to indicate that not only defences but also rights of set-off could be waived.

Paragraph (2)

222. It was noted that the words "made at the time of the conclusion of the original contract or thereafter" reflected a suggestion made at the previous session of the Working Group that the provision should specify the point of time at which a waiver would be made. It was recalled that the time of the conclusion of the original contract between the debtor and the assignor, was instrumental in determining the credit terms that the assignee could make available to the assignor, which in turn could affect the credit terms offered to the debtor. It was also recalled that there were cases in practice, in which a waiver would be made, or an earlier waiver modified, subsequent to the conclusion of the original contract between the debtor and the assignor (see A/CN.9/420, para. 138).

223. The view was expressed that there was no reason to limit the scope of the provision to waivers made at the time of the conclusion of the original contract or after that time. It was pointed out that, in a number of practical situations involving future receivables, waivers were made before the original contract was concluded. For example, it was said that a vital element in assignment of future credit-cards receivables was that such waivers were made before the original contract was concluded. After discussion, the Working Group decided that the reference to the time when the waiver was made should be deleted.

224. With respect to the words between square brackets ("the availability of which the debtor knew or ought to have known at the time of waiver"), it was generally felt that any reference to what the debtor "knew" at the time when the waiver was made would inject an undesirable degree of uncertainty and subjectivity, which would have an adverse impact on the cost of credit. While a view was expressed that the words between square brackets should be retained for purposes of debtor protection, the Working Group decided that they should be deleted.

225. The view was expressed that the remainder of paragraph (2) ("A waiver of defences shall preclude the debtor from asserting defences") might be regarded as merely stating the obvious. In addition, it was observed that that formulation would replace the contractual and estoppel basis of the waiver with a convention basis, thereby possibly affecting other law applicable to such waivers. It was thus suggested that those words might be deleted or, alternatively, replaced by a general reference to national law applicable to waivers of defences. The prevailing view, however, was that those words were useful and should be retained. It was pointed out that, in certain countries, wording along the lines of paragraph (2) was necessary to avoid the risk that a court applying national law might overrule a waiver of defences on the ground that such a waiver might be unfair to the debtor. As a matter of drafting, it was suggested that consideration might be given to the possibility of combining paragraph (2) with paragraph (1).

226. A question was raised as to whether draft article 16 should recognize blanket waivers, covering all possible defences, or whether only identified defences could be waived. The Working Group agreed that the issue might need to be discussed further at a future session.

Paragraph (3)

227. The Working Group found the substance of paragraph (3) to be generally acceptable. With respect to subparagraph (b), a suggestion was made that the exclusion of defences arising from fraudulent acts should be made subject to domestic law, so as not to affect situations where domestic law might allow the waiver of defences arising from fraudulent acts, e.g., fraudulent acts on the part of employees of a party. It was generally felt, however, that waivers of defences arising from fraudulent acts on the part of the assignee should be prohibited.

228. The discussion focused on the question whether further defences that might not be waived should be listed. It was noted that paragraph (3) was based on article 30(1)(c) of the United Nations Convention on International Bills of Exchange and International Promissory Notes (hereinafter referred to as "the Bills and Notes Convention"). The view was expressed that, in the preparation of the draft convention, attention should be given to possible analogies between situations covered by the draft convention and certain provisions of the Bills and Notes Convention. Accordingly, it was stated that one of the possible objectives of the draft convention might be that receivables should be treated, to a large extent, like negotiable instruments. It was suggested that the draft convention should afford the assignee the same level of protection as afforded to the protected holder by the Bills and Notes Convention.

229. Various suggestions were made for possible additions to the list of exclusions contained in paragraph (3). One suggestion was that defences arising from fraudulent acts on the part of the assignor should be excluded. After discussion, it was decided that the words "or the assignor" should be added at the end of subparagraph (b) between square brackets. Other suggestions were that other defences taken into account by article 30 of the Bills and Notes Convention should also be excluded. It was agreed that the issue might need to be discussed further at a future session.

230. The view was expressed that paragraph (3) should contain an indication that a waiver of defences was only possible to the extent permitted by the law applicable to the relationship between the assignor and the debtor. Reference was made in that connection to the understanding that the draft convention was not intended to override other applicable law dealing with questions of validity of waivers of defences.

231. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (3), taking into account the suggestions made.

Paragraph (4)

232. It was noted that paragraph (4) established the rule that revocation of the waiver should be "explicit", and made by way of a "written agreement". While there was agreement as to the substance of the rule, a number of concerns were expressed as to its precise formulation. One concern was that use of the term "revoked" gave the impression that a unilateral act was meant and not an agreement. In order to address that concern, the suggestion was made that reference should rather be made to "modification" of the waiver. Another concern was that the reference to an "explicit written agreement" could inadvertently result in invalidating waivers contained in standard terms and conditions. In order to allay that concern, the suggestion was made that the term "explicit" should be deleted. It was observed that a reference to a written agreement should be sufficient and in line with the terminology used in the United Nations Sales Convention. After discussion, the Working Group approved paragraph (4) subject to the modifications suggested.

Paragraph (5)

233. It was noted that paragraph (5), which had been inserted pursuant to a suggestion made at the previous session of the Working Group, provided for an implied waiver of defences in case of acceptance of the assignment by the debtor. It appeared within square brackets, since it might be inconsistent with the principle embodied in paragraph (1) that, in order to protect the debtor from unintentionally waiving defences, any waiver of defences should be explicit. It was generally agreed that the debtor's acceptance of the assignment should not be considered as a waiver of defences. However, the view was expressed that the practice in which the debtor's consent was treated as a waiver of defences could be accommodated by referring to trade usages in the interpretation of assignment, a matter covered under draft article 10(4). After discussion, the Working Group decided to delete paragraph (5).

Paragraph (6)

234. It was recalled that the Working Group had decided to take a broad approach as to the types of assignments and the types of receivables to be covered by the draft convention, without excluding assignments of consumer receivables. In confirming its decision, the Working Group noted that there already existed a significant market involving credit being extended on the basis of consumer receivables, which allowed access to lower-cost credit to manufacturers, retailers and consumers and which should not be interfered with.

235. A number of concerns were expressed with regard to paragraph (6). One concern was that it was not clear whether it made it impossible for consumers to waive their defences or whether such a waiver was left to the applicable domestic law. Another concern was that paragraph (6) might be inconsistent with domestic law applicable on consumer protection. Yet another concern was that in the context of bulk assignments of large numbers of low-value receivables, it was impractical to require parties to determine the consumer or commercial nature of the receivables assigned. In order to address those concerns, the suggestion was made that paragraph (6) should be deleted.

236. That suggestion was objected to on the ground that allowing waivers of defences in a consumer context might run counter to well-established consumer protection principles and might unnecessarily complicate the draft convention thus compromising its acceptability.

237. In response, it was observed that, as a matter of principle, the main aim of the draft convention was not to protect consumers, which was in any case a matter for the applicable domestic law, but to increase the availability of lower cost credit, to all parties, including consumers. In addition, it was stated that the only effect of the deletion of paragraph (6) would be that the draft convention would leave consumer protection issues to the applicable domestic law. If necessary, it was suggested, a note could be included in the text indicating that the draft convention did not override consumer protection laws. It was noted that that approach was followed in the UNCITRAL Model Law on International Credit Transfers and in the UNCITRAL Model Law on Electronic Commerce. However, a note of caution was struck that such an approach might be inappropriate in the present context and might cast a doubt on practices involving consumer receivables, such as the practice of securitization of consumer credit card receivables.

238. After discussion, the Working Group decided to delete paragraph (6) and requested the Secretariat to consider including in the text a footnote within brackets clarifying that the draft convention did not override consumer protection laws. As a result of that decision, the Working

Group noted that there remained no provision in the text referring to consumer receivables and, accordingly, decided to delete paragraph (5) of draft article 2.

Article 17. Recovery of advances

239. The text of draft article 17 as considered by the Working Group was as follows:

> "(1) Without prejudice to the debtor's rights under article 14, failure of the assignor to perform the original contract does not entitle the debtor to recover a sum paid by the debtor to the assignee.
>
> "(2) An assignment shall not prejudice the debtor's rights against the assignor arising from the failure of the assignor to perform the original contract including, but not limited to the right of the debtor to recover from the assignor sums paid by the debtor to the assignee."

Paragraph (1)

240. It was noted that paragraph (1) was aimed at ensuring that the debtor bore the risk of non-performance of the obligations of its contractual partner, i.e., the assignor, while preserving the defences that the debtor could assert against the assignee under draft article 14.

241. In response to a query raised, it was noted that, at its previous session, the Working Group had decided that draft article 17 should not include exceptions to the rule of the type included in the comparable provision of the Factoring Convention (article 10). Those exceptions included the case in which the assignee had not paid or loaned money to the assignor as required in the financing contract, and the case in which the assignee was aware of the assignor's failure in performance of the original contract. It was considered that exceptions of that type were particular to specific cases of factoring, in which it was typical for a guarantee of performance to be given by the factor (assignee). Reflecting such exceptions in the general text being prepared would create obstacles to a variety of financing structures used in practice (A/CN.9/420, para. 146). In addition, it was observed that a rule along the lines of article 10 of the Factoring Convention might not be appropriate with regard to a number of transactions which, although labelled as "factoring", involved assignments for servicing purposes. The view was expressed, however, that, in case a State ratified both the draft convention and the Factoring Convention, debtors whose debts had been factored commercially would be in a more advantageous position than debtors whose debts had been assigned under the draft convention, a result that was said to be unusual. As a matter of drafting, the suggestion was made that paragraph (1) should make it clear that it referred to recovery of advances from the assignee.

242. After discussion, the Working Group approved paragraph (1), subject to the drafting modification suggested.

Paragraph (2)

243. It was noted that paragraph (2), inserted pursuant to a suggestion made at the previous session of the Working Group, was intended to preserve the rights of the debtor against the assignor for breach of the original contract, in particular the right to recover from the assignor advance payments made by the debtor to the assignee (A/CN.9/420, para. 148).

244. There was broad support in the Working Group for the substance of the rule contained in paragraph (2). However, it was generally felt that it dealt with the fundamental principle that the assignment should not change the legal position of the debtor, which was also reflected, e.g., in draft articles 6(1)(b), 14 and 19, and should rather be placed at the beginning of the draft convention. As a matter of drafting, it was suggested that the reference to the right of the debtor to recover from the assignee sums paid to the assignee in advance, was not necessary and could be deleted. After discussion, the Working Group approved the substance of paragraph (2) and requested the Secretariat to place it at the appropriate place in the text.

Article 18. Priority

245. The text of draft article 18 as considered by the Working Group was as follows:

"(1) Where a receivable is assigned by the assignor to several assignees, the [first assignee] [the first assignee to notify the debtor pursuant to article 13] [the first assignee to register the assignment] has priority.

"(2) The assignee has priority over creditors of the assignor, provided that [the assignment] [notification of the debtor] [registration of the assignment] occurred prior to the time at which the creditors of the assignor acquired a right in the assigned receivables.

"(3) In case of insolvency of the assignor, the assignee has priority over the insolvency administrator, provided that [the assignment] [notification of the debtor] [registration of the assignment] occurred before the effective date of the insolvency proceedings.

"[(4) [Without prejudice to other rules of law relating to priority], the preceding paragraphs shall not apply in the following cases: [...]]

"[(5) The assignee may register at a public register in the location of the assignor a summary statement, which reasonably identifies the assignor, the assignee, the assigned receivables and the secured obligation, if any. In the absence of registration, [the first assignee] [the first assignee to notify the debtor] shall have priority, subject to paragraphs (2) and (3) of this article].

"(6) For the purposes of this article, priority means the right of a person to satisfy its claim against the assignor on the basis of the assigned receivables in preference to other persons.

"(7) Nothing in this article shall affect any provisions applicable to the insolvency of the assignor."

246. It was generally agreed that uncertainty with regard to priority constituted an important obstacle to receivables financing, since creditors might withhold credit or make credit available at a higher cost if they were not certain that they would receive priority, in particular in case of insolvency of the assignor. Draft article 18 was, therefore, of paramount importance for a uniform law aimed at increasing the availability of credit.

Paragraph (1)

247. It was noted that paragraph (1) dealt with conflicts of priority between several assignees of the same assignor, and offered three optional rules as to how priority could be determined. The first option ("the first assignee has priority") did not establish any mechanism for publicity of the assignment. The view was expressed that such a rule existed in certain national laws and that it might be considered as a possible secondary rule for determining priority under the draft convention. It was generally felt, however, that the principal rule for determining priority should somehow provide for the publicity of the assignment, so as to avoid practical difficulties with respect to evidence of the various assignments involved. It was also felt that, while priorities as to existing claims could appropriately be dealt with under a system based on the time of the assignment, such a system might raise practical difficulties in the context of assignments of future receivables and bulk assignments. After discussion, the Working Group decided that the first option should be deleted.

248. The discussion focused on the other two options ("the first assignee to notify the debtor pursuant to article 13 has priority" and "the first assignee to register the assignment has priority"). In favour of adopting a system based on notification, it was stated that such a system was currently functioning satisfactorily under the laws of many countries. It was observed that deviating from such well-established practices would create risks of conflicts between rules governing domestic assignments and rules applicable under the draft convention. Such risks might have a negative effect on the acceptability of the draft convention, particularly in view of the decision made by the Working Group to extend its scope to cover international assignments of domestic receivables. In response, it was observed that a priority rule based on notification might result in less new credit for new markets.

249. A widely shared view was that adopting a system based on registration was, in theory, the best possible approach to the issues of priority. It was stated that such an approach could also be relied upon in practice, provided that the registration system satisfied certain criteria, for example, that it operated at a low cost, under transparent rules, and was easily accessible. Doubts were expressed, however, as to whether it was realistic to envisage that the legal, technical and political difficulties likely to arise in the context of the establishment of a registration system could be resolved in a time-frame that would not unduly delay the completion of the draft convention.

250. The suggestion was thus made that the draft convention might combine the two approaches by providing two sets of provisions, one based on registration and the other on notification, leaving it to contracting States to choose which approach they favoured. In addition, including the two sets of rules in the draft convention might be the best way of accommodating future technical developments, which might result in a more widespread use of registration.

251. The Working Group postponed its decision as to whether the issues of priority should be dealt with by way of notification or by way of registration. It was generally felt that, before such a decision could be made, more information was needed about the feasibility of a system based on

registration. It was noted that work involving the issues of registration was currently being carried out by various international organizations, including UNIDROIT (in the context of the preparation of the draft convention on international interests in mobile equipment), and regional organizations such as the European Union and the North American Free Trade Association (NAFTA). The Secretariat was requested to investigate the issues involved in a possible registration system and to report to the Working Group, so that an informed decision could be made in that respect. The issues to be considered included: whether a registration system should be based on an international registry or on a linkage of national registries; whether the registration system should be paper-based or computerized; whether the role of a registrar should be purely administrative or whether it would be expected to make legal determinations, e.g., with respect to the legal validity of the registration; whether access to the registry should be free or limited to certain interested parties; what costs were involved by registration; which authentication techniques should be used; what should be the duration of the registration; and which rules could be envisaged for errors in registration, liability in case of error, and court jurisdiction.

252. The Working Group noted that, in the context of the discussion of draft article 13, it had postponed its deliberation on paragraph (4), which dealt with discharge of the debtor's obligation to pay in the context of multiple assignments. After discussion, the Working Group found the substance of paragraph (4) of draft article 13 to be generally acceptable.

Paragraph (2)

253. Differing views were expressed as to whether paragraph (2) should be retained or deleted. One view was that, to the extent that paragraph (2) dealt with conflicts between the assignee and unsecured creditors of the assignor, it served no useful purpose and should be deleted. The prevailing view, however, was that paragraph (2), which should be read in conjunction with paragraph (3), provided certainty by establishing that the assignor had priority not only over the insolvency administrator but also over creditors of the assignor seizing the assigned receivables. In support of retention of paragraph (2), it was observed that paragraph (2) served the purpose of providing potential creditors of the assignor with the opportunity to determine whether the assignor's receivables had been assigned. After discussion, the Working Group found the substance of paragraph (2) to be generally acceptable, subject to the decision to be made at a later stage with respect to paragraph (1).

Paragraph (3)

254. It was generally agreed that paragraph (3) should be revised to address the question whether future receivables assigned before the effective date of the insolvency of the assignor but arising after that date were effectively transferred, thus being excluded from the insolvency estate.

255. Differing views were expressed as to how that question should be addressed. One view was that the transfer of future receivables should be effective as from the time of the assignment, even if the receivables became due or were earned by performance after the effective date of the insolvency proceedings. Adopting such an approach, it was stated, could significantly facilitate receivables financing and increase the availability of lower-cost credit, since it would provide assignees with the certainty necessary to make credit available on the basis of bulk assignments of future receivables.

256. In opposition to that view, it was observed that such an approach would result in effectively removing the assigned receivables from the insolvency estate of the assignor, a result which might run counter to national rules applicable in case of insolvency. It was pointed out that such an interference with national insolvency rules might be undesirable since it would affect the interests of privileged creditors (e.g., State, employees) and thus upset the balance of interests established by national insolvency rules. It was, therefore, suggested that the transfer of future receivables should be effective with respect to the administrator in the insolvency of the assignor only if the future receivables became due or were earned by performance before the effective date of insolvency.

257. In the discussion, the question was raised whether the time of the effective transfer of future receivables should differ depending on whether assignments by way of sale or by way of security were involved. The Working Group confirmed the approach taken in its discussion of draft article 12 that drawing such a distinction would be problematic. It was pointed out that, because of the variety in the forms of transfers agreed upon by the parties, and because of the wide differences among legal systems as to the classification of transfers, an assignment by way of security could, in fact, possess attributes of a sale, while a sale might be used as a security device.

258. After discussion, the Working Group requested the Secretariat to prepare a revised draft of paragraph (3), presenting variants reflecting the views expressed. The Working Group decided that draft article 7(2), which also dealt with the time of transfer of future receivables, should reflect the same approach.

Paragraphs (4) to (6)

259. The Working Group noted that the contents of paragraphs (4) to (6) would depend on the approach to be adopted with regard to conflicts of priority in paragraphs (1) and (2), and decided to defer its discussion of paragraphs (4) to (6) until it had taken a decision on the issue of priority.

Paragraph (7)

260. In view of its discussion of paragraph (3), the Working Group requested the Secretariat to prepare a revised draft of paragraph (7), reflecting the possibility of the draft convention affecting to some extent the law applicable to insolvency. While it was recognized that the relationship between the draft convention and national rules applicable in case of insolvency should be examined with particular care, the Working Group was not opposed in principle to considering an approach aimed at harmonizing some aspects of the law applicable in case of insolvency. It was noted that, in a somewhat different context, that was the aim of the Working Group on Insolvency Law, which was preparing model legislative provisions on judicial cooperation and access and recognition in cross-border insolvency cases.

Article 19. Payment to a specified bank account and priority

261. The text of draft article 19 as considered by the Working Group was as follows:

> "(1) If agreed between the assignor and the debtor before notification of the assignment pursuant to paragraph (2) of article 13, the debtor is entitled to pay into a bank account or a post office box specified in the agreement and be discharged from liability. After notification

of the assignment pursuant to paragraph (2) of article 13, the debtor and the assignee may agree on the method of payment.

"(2) In case of an agreement between the assignor and the debtor pursuant to paragraph (1) of this article, the person in control of the bank account or the post office box specified in the agreement for the purpose of payment by the debtor has priority."

Paragraph (1)

262. While support was expressed in favour of the principle embodied in paragraph (1), a number of suggestions were made. One suggestion was that the scope of the provision should be enlarged so as to cover cases in which there was no agreement between the parties for payment into an account in the country of the debtor. Another suggestion was that the payment should be treated as irrevocable so as to ensure discharge of the debtor's obligation and the effective transfer of the receivable from the estate of the debtor. Yet another suggestion was that paragraph (1) should be moved to draft article 13, since it dealt with discharge of the debtor's obligation. Subject to the suggested modifications, the Working Group approved the substance of paragraph (1).

Paragraph (2)

263. It was noted that under paragraph (2) the owner of the bank account into which the receivables were paid, who could draw on that account and was recognized by the bank as having that right, would prevail over creditors claiming a right in the assigned receivables. While support was expressed for the type of financing involving such payments, a number of concerns were expressed as to the formulation of paragraph (2). One concern was that it introduced uncertainty, since it was not clear whether it referred to the receivables or their proceeds. Another concern was that it might run counter to the rule on priority to be adopted in draft article 18. Yet another concern was that the reference to the person "in control" of the bank account might be unclear. The Working Group decided to retain paragraph (2) for further consideration at a future session.

CHAPTER IV. SUBSEQUENT ASSIGNMENTS

Article 20. Subsequent assignments

264. The text of draft article 20 as considered by the Working Group was as follows:

"(1) [This Convention] [This Law] applies to any assignment by the initial or any other assignee to subsequent assignees, provided that [the initial] [such] assignment is governed by [this Convention] [this Law].

"(2) [This Convention] [this Law] applies as if the subsequent assignee were the initial assignee. However, the debtor may not assert against a subsequent assignee rights of setoff in respect of claims existing against an earlier assignee[, with the exception of rights existing against the penultimate assignee who is the ultimate assignor].

"(3) "Variant A

"A subsequent assignment of receivables transfers the receivables to the assignee notwithstanding any agreement prohibiting or restricting such assignment. Nothing in this paragraph affects any obligation or liability of a subsequent assignee for breach of a no-assignment clause.

"Variant B

"An agreement (...) prohibiting or restricting assignment of receivables is invalid. An assignment of a receivable transfers the receivables to the assignee notwithstanding such an agreement. Neither an assignor nor an assignee have any liability for breach of such an agreement.

"(4) Notwithstanding that the invalidity of an intermediate assignment renders all subsequent assignments invalid, the debtor may pay the first assignee to notify pursuant to paragraph (2) of article 13 and be discharged from liability."

Paragraph (1)

265. The concern was expressed that paragraph (1) might inadvertently result in excluding certain securitization transactions, which involved a series of subsequent assignments, merely because the initial assignment between affiliated companies located in the same State would be a domestic one. To address that concern, the suggestion was made that paragraph (1) should be revised to make it clear that subsequent assignments would be covered if they met the criteria for the application of the draft convention set forth in draft article 1. Subject to that revision, the Working Group approved the substance of paragraph (1).

Paragraph (2)

266. Support was expressed for the principle that the draft convention should apply to a subsequent assignee as if it were the initial assignee. As a matter of drafting, it was suggested that the opening words might read along the following lines: "The other provisions of this Convention ...". With regard to the rights of set-off, it was suggested that the matter could be dealt with in the original contract and should not be covered in the draft convention. Subject to the suggested drafting modifications, the Working Group approved paragraph (2) and decided that the reference to set-off should be retained within square brackets for further consideration at a future session.

Paragraph (3)

267. It was noted that paragraph (3) was intended to cover no-assignment clauses contained in refinancing contracts. The view was expressed that an approach along the lines of variant B could be considered, since no-assignment clauses contained in refinancing contracts were not aimed at protecting a debtor. However, as a result of the decision made during the discussion of draft article 8(1), the Working Group decided to delete variant B and to retain variant A on the understanding that variant A of draft article 20(3) should reflect a result consistent with variant A of draft article 8(1).

Paragraph (4)

268. Support was expressed for paragraph (4), which allowed the debtor to pay the first assignee to notify, without having to determine whether the assignments were valid. The view was expressed, however, that knowledge of the invalidity of the assignment should preclude the debtor from discharging its obligation by paying the assignee. The Working Group decided to retain paragraph (4), pending further consideration of the issue of knowledge of the invalidity of the assignment on the part of the debtor in draft article 13.

FUTURE WORK

269. Having concluded its deliberations on the draft convention on assignment in receivables financing, the Working Group noted that the Hague Conference on Private International Law planned to prepare and submit to the Working Group for consideration at its next session a paper on conflict-of-laws issues on assignment and related aspects of insolvency law. It was noted that the next session of the Working Group was scheduled to be held at Vienna from 11 to 22 November 1996.

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